Judicial Review of Administrative Decisions

~~FACULTY OF POLITICAL SCIENCE AND ECONOMICS~~

~~MASTER OF ARTS THESIS~~

Thesis presented to the Faculty of Arts

~~JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS~~

of the University of ~~Arts~~ Ottawa ~~through the~~ as partial fulfillment of the requirements for the degree of Master of Arts

Ottawa, Canada, 1955.

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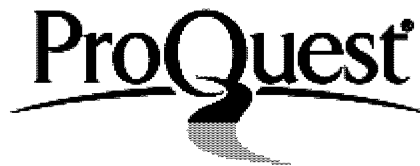

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TITLE OF MA-THESIS — Judicial Review of Administration

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~~SYNOPSIS~~

The first grounds on which administrative tribunals are amenable to judicial review are constitutional. Statute cannot abrogate the doctrine of ultra vires. A tribunal cannot determine its own jurisdiction. A fortiori, the legislation setting up the tribunal must lie within the legislative competence of the enacting body. The power of the courts to rule on the validity of intragovernmental delegation of legislative authority is a significant ground of intervention. It would appear from the Zaslavsky Case that such "delegation", to pass curial scrutiny, must amount to "incorporation by reference"; otherwise, it will be ruled invalid as "abdication" of legislative power. However, the principle that a legislature may delegate its powers goes back to Hodge v. the Queen, and it is submitted that the legislature should not be restricted in its choice of agents or delegates, and that, accordingly, the Zaslavsky Case was decided on wrong principles.

S.96 of the British North America Act reserves power of appointment of judges of the Superior, District and County Courts to the Governor General in Council. Consequently, if a court finds a provincial tribunal to be a " court" within the meaning of s.96 it can hold the legislation invalid in that the officer of the tribunal should have been appointed by the Federal Government rather than by the province. It is incompetent to increase the jurisdiction of an inferior court existing in 1867 to make it a superior court under the s. or to set up a ttibunal subsequent to 1867 and confer upon it jurisdiction to determine any question of a type normally determined by a s. 96 court.

Aside from constitutional grounds, in the absence of statutory appeal, review lies through the medium of the prerogative writs. It is important to ascertain the nature of the function of the tribunal under review, because the prerogative writs, (or the mot important ones), traditionally lie only to correct excess or abuse of jurisdiction of inferior judicial bodies, because of the possibility of the tribunal being a s.96 court, and as determining the curial view towards applying natural justice factors such as the right to cross-examine, to produce documents, to the finding under review.

Administrative tribunals are found to be tribunals possessed

of unfettered, absolute discretion, acting on considerations of policy and expediency, whose functions are primarily legislative in character. They "create"rights and "impose" obligations, "impose" being used in the sense of "create".

The judicial function is dofferentiated from ministerial, ministerial involving merely the execution or enforcement of decisions arrived at by administrative or judicial bodies. Several definitions of "judicial" are examined, and it is cohluded that basically it involves the ascertainment and pronouncement of pre-existing rights and obligations, the existence of a lis inter partes, or dispute between parties; and finally, the exercise of judicial discretion involves constant reference to and analogy from existing precedent, as opposed to the unrestrivted, legislative type of discretion vested in administrative tribunals.

Increasing curial awarenews of the constrictave denotations of "judicial" seems to have led to the increasing application by the courts of the concept "quasi-judicial", which means that the jurisdiction of the tribunal, affecting rights and property of the subject in certain privatory ways, must be exercised according to the principles of natural justice.

Case law is examined under three headings, I733-I9II, I9II-Present, and "Recent Canadian Cases". I9II is significant as the year in which the Rice Case was decided, wherein was laid down for the first time, the nature of the hearing that must be accorded by an administrative tribunal. From the cases, one of the principal conslusions drawn is that a court, when seized of meritorious facts, will intervene even if it involves some distortion of principles properly applicable to the differentiation of functions, and will frequently characterize the body whose decision is under review as quasi-judicial, or subject to the requirement that it must act "judicially" so as to bring the body within the prop er shpere of its surveillance, even when the body is really an administrative one by any objective criterion.

It is concluded that certain considerations preclude the treatment of the entire problem of judicial review as one of statutory interpretation, as has been suggested by some writers. The chief canons of construction are examined, and the conclusion is inevitable

that, despite certain fundamental unanimity of approach, considerable latitude exists in a court to "select" a rule which would give the desired result. We look at the contention that rules of construction are now used, not to ascertain legislative intent but to control it. The effect of broad drafting as opposed to statutory prolixity are cursorily examined.

"Curial Machinery" examines at greater length the use of the writs in practice, particularly the proposition heretofor taken for granted that certiorari lies only to judicial bodies. Some justification is found fot the contention that certiorari should properly lie to review purely administrative bodies, but it is deemed unlikely, even in view of crecent Canadian precedent, that the courts should now generally arrogate to themselves an unrestricted use of this remedy.

A tribunal cannot determine its own jurisdiction. Sometimes, statute calls for a decision on a preliminary state of facts which must be properly determined by the tribunal before it is vested with further jurisdiction. This is a case of " jurisdictional fact".

As a rule, administrative tribunals are final judges of fact. However, the question arises as to the extent to which a court will interfere if the tribunal has no evidence before it on which to arrive at a finding of fact, or, if it has evidence before it but acts on " extraneous considerations". As appeal is frequently given on questions of law, difficulties of distinguishing between them i.e. law and fact, vests the court with a further "indeterminate" weapon of interference.

A court will interfere if there is an error of law apparent on the face of the record, presumably even in certain cases where the body is found to be purely administrative.

Under "Natural Justice", is discussed I. the right to a hearing; 2. sufficiency of evidence; 3. showing of reasons; 4 cross-examination. If failure of the tribunal, to allow I, 2, or 4 of the above constitutes substantial denial of natural justice, the court will probably interfere, perhaps even where the tribunal is purely administrative.

The extent of judicial review is in a sense, an index of

the "collectivist animus" present in the body politic of a jurisdiction. In England, it is probably ob the decline, in Canada, on the increase.

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NOTE ON SOURCES

There is not a text-book or major published work of Canadian origin dealing with this most important subject. In England, Lord Chief Justice Hewitt wrote his famous "New Despotism" in 1929, which was a powerful, acidulous, but hardly accurate "exposition" of the conspiracy of bureaucracy to overthrow the rule of law and run the country. In most respects, the motives, and in many respects the methods, of bureaucracy were vindicated by the Committee on Minister Powers, which was convend as a result of the uproar brought on by the Lord Chief Justice's book. The Minutes and Findings of the Committee were published as Command Paper 4060 in 1932 by His Majesty's Stationery Office.

I have had considerable recourse to the able work of Prof. W.A. Robson, "Justice and Administrative Law" 4th.Ed., published in London by Stevens and Company Ltd., and, to a lesser extent, to Dr. Jenning's "Law and the Constitution" 3rd.Ed. published in London. In a number of cases, I had arrived at conclusions independently, to find them confirmed by the foregoing, particularly Dr. Robson; in other cases their conclusions served as the starting point for independent case research; and, in a considerable number of cases, I have had the temerity to differ from such learned authorities, always with the greatest of misgivings.

Considerable writing has been done on the sociological, jurisprudential, and political science aspects of the growth of administrative law, particularly by the noted American juridical writers such as Pound, Freund, and Dickinson. Peremptory references have been made to utterances of these three authorities where illustration of direct legal principle has been in order, but no extended research was attempted in the broader jurisprudential fields encompassed by their work. Excerpts from their writings, together with reports of American case law are found in "Cases and Other Materials on Legislation", edited by Read and MacDonald 1948, Foundation Press Inc. Most, but not all, of the American references emanated from this source. Prof. Bernard Schwartz was consulted at some length (Law and the Executive in Britain, 2nd. Ed.) and he has been quoted two or three times. His work is enlightening in that it shows the process of judicial review against a background of the American Constitution with its much more rigid separation of powers and "due process" clause.

Considerable writing has been done on specific phases of the subject, published almost exclusively in legal periodicals such as the Law Quarterly Review, the Harvard Law Review, and the Canadian Bar Review. Perhaps the outstanding contribution has been the articles "Administrative Tribunals and the Courts" by DM Gordon of Vancouver, published in 49 LQR, insofar as he cut away a great deal of misapprehension that had accumulated for years respecting the classification of tribunal's powers. He has had the signal honour of having been quoted with the force ofdictum in the Ontario Court of Appeal. Of all sources, the writer is perhaps most indebted to Mr.Gordon, and my attempts to show him at fault in minor particulars I am sure savours of presumption.

No effort will be made to catelogue the articles in the Canadian Bar Review and Law Quarterly Review to which I have had recourse, and to which I am indebted in varying degrees. The articles are cited fully in the body of the paper. Some articles have been largely in the nature of diatribes against the mushroom growth of administrative tribunals, such as those quoted in the Introduction, e.g. Sir William Mulock's address on the occassion of his ninetieth birthday 1934 CBR 35, and Senator J W de B Farris 1938 16 CBR 509. Others are the work of law professors and juridical writers like Prof. Willis (e.g Three Approaches to Administrative Law, 1935-36 University of Toronto Law Journal 53); and Prof. Finkleman (e.g.Separation of Powers, 1935-36 UTLJ 313), both representative of imaginative and able expositions of aspects of our problem which are "staggered" in favour of the continued expansion of government activities and tribunals as the means to achieving the social service state. We have, of course, consulted Dicey, the lion of the rule of law, noting with great interest his "swan-song" or apparent last-minute defection in the "Growth of Administrative Law in England" 31 LQR. Of the numerous articles studied, special note must be taken of Prof. F.R.Scott's article "Administrative Law" in the 1947 Anniversary Issue of the CBR, which gave an initial directional stimulus to this project, and also brought together a number of valuable references.

Of special significance, too, were the Lectures of RF Reid, Osgoode Hall staff, entitled "Administrative Law; Rights and Remedies" published in the Law Society's Special Lectures 1953 (DeBoo Ltd. Toronto) These lectures brought together valuable citations of recent cases for

use particularly in the section "Natural Justice".

Ultimately, of course, in a paper of this nature, the student is thrown back on the case books. It must be noted that the state of the case law on this subject is a riot of confusion, although certain principles have been enunciated to which lip service has been generally accorded whilest evading or departing therefrom in practice. While more enlightenment is usually forthcoming from the academic studies of juridical writers, the fact that the present paper is largely a purely legal exposition has been kept constatnly in mind, with the continuing sine qua non of constant reference to the existing cases.

Unfortunately, most of the case digests do not list a heading "Administrative Law". This is true of the Can. Abridgement, Halsbury, CED, the English and Empire Digest. Consequently, the researcher is thrown back on a hodge-podge of associated subject-matters to find his law, e.g. certiorari, prohibition, mandamus, labour law, constitutional law, etc. Accordingly, to make any sense out of the findings from these heterogeneous sources, an elaborate system of cateloguing and cross-referencing is necessary. The writer has made most extensive use of the Can. Abridgement (published in 35 volumes plus annuals from 1935, by Carswell Col of Toronto). Some use has also been made of Mews Digest of English cases.

Sometimes, it has been found convenient to quote head-notes or excerpts therefrom. Here, the headnote excerpt is in quotes; if, however, the words of an actual judgement are quoted, it has been the practise as far as possible to name the judge, e.g. per Roach J. Needless to say headnotes have been employed to illustrate onlythe simplest points. The more important decisions and those involving opposing contentions have been exhaustively perused.

INTRODUCTION

Administrative tribunals have been in existence for many hundreds of years. It has been suggested that they were known in the Middle Ages, but the evidence is in any event conclusive that they were well established in the time of Henry VIII. It was not, however, until 1911 that a superior court prescribed the nature of the hearing that was to be held before them. (1) This tardiness in asserting the right of courts of law to review the proceedings of tribunals of this type was probably due in the first instance, to the localization of the tribunals and jurisdictions and the nature of the issues with which they dealt. The unprecedented transfer of the last fifty years of the functions exercised previously be courts of justice to this kind of legislative creation accompanied by the increase in centralisation engendered by the growht of the social service state, has trmendously augmented the powers and functions of the great departments of the central government, and has brought into increasingly sharp focus the entire question of the extent to which the courts are able to control and correct the findings and decisions of the tribunals set up by statute to implement the new powers.

It is customary to associate the rapid growth of administrative law and tribunals as a necessary corollary of the great social revolution, as an inseparable adjunct to the trend to collectivization, as the superstructure inherent in the movement away from the individual rights of the common law era towards the public welfare concepts of the present day.

"In fully half of some 225 public acts of the Federal Parliament now in force, Parliament has delegated power to the executive to legislate by order-in-council or departmental regulation," wrote Professor Corry in the 1933 Proceedings of the Canadian Political Science Association (v.5 p.196).

Today the total figure and the percentage involved

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(1) Board of Education v. Rice, ~~cited post.~~ 1911 AC 179.

has vastly increased.

In 1936, Professor Willis wrote in the University of Toronto Law Journal, (v.I,p.56)," the whole field of human activity is handed over to small bodies. Instead of Parliament retaining power to set up or vary standards, e.g. freight rates and classifications, perhaps even the making of regulations to carry out the intent and meaning of the statute, are given to boards or commissions."

These "new" tribunals vary in size and nature from a lone Mounted Policeman conducting hearings in pursuance of the Excise Act, to the Municipal Board of Ontario sitting in court-like fashion in a large room with a raised dais for the Bench, counsel tables, witness stands, and giving reasoned decisions, published from time to time in the Ontario Weekly Notes. They are the largest single medium regulating the relations between the individual and his almost omniscient state.

Many and varied have been the challenges in ink hurled forth upon the growht of these tribunals. Sir William Mulock addressed the Bar Association on the occasion of his ninetieth birthday (I) in these oft-quoted words. " The presiding officer (of the administrative tribunal) not required to know anything of the law which he is to administer, free of his own will to hear the case in public or private, in the presence or absence of the parties, with or without evidence, with or without the assistance of lawyers to prevent perjury; free to disregard the evidence and the law and to give the final decision without any reasons therefor, and not appealable to any court. Is that the position to whoich anyone with British blood in his veins should quietly submit?" Again," I appeal to my brethern of the Bar and all other patriotic citizens to watch and prevent, if possible, all legislation which threatens to overthrow the rule of law. The national safety is in danger."

(I) 34 Can. Bar Rev. 39)

Another frequently-noted diatribe is that of Senator B. De Farris (1)," It does not follow that the existence of democracy is in itself a guarantee of the justice of the courts. There may be tyrannies even in Democracy. Parliament is always capable of destroying the work of the courts. Whatever menace there is today to the justice of the courts comes from Parliament. It has been through Parliament that the British people have fought their way to constitutional freedom in the past and have gained for themselves their security in the fustice of the courts. The power to create is the power to destroy. If Parliament has been the instrument of British freedom in the past it can also be the instrument for the destruction of those same rights." And further on," It has been necessary for the people to struggle from the days of King John at Rubneymeade to the present to secure their rights to justice in the courts. The question now is 'are we properly safeguarding those rights?' now that we have secured them?' " Again, "---laws passed from time to time in this country which directly defeat the justice of the courts because these laws deny our citizens access to the courts." Further, " I think the lawyers of Canada---should take a firm stand for the future that any legislation denying to any man his right to seek justice in the courts is a violationof our ideals of justice, is contrary to the fundamentals of our Democracy and is a challenge and threat to our free institutions. It is our duty to fight this sort of thing to the limit." He quotes Hewart C.J. (2),"---even more disastrous is the result when men performing administrative duties are also required to perform judicial duties." (2)

Even Professor Finkleman,whose writings disclose that he is completely cognizant of the shortcomings of the old Dicey rule of law, says respecting the danger of Parliament abdicating its powers in favour of administrative bodies, " there are

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(1) 38 Can. Bar Rev. 509
(2) "The New Despotism"

many grave dangers inherent in such delegation, and the critics of the system are quite correct in calling attention to these dangers. The greatest danger is that men of affairs are blissfully unaware of recent tendencies. Any knotty problem can be shelved by delegating it to an administrative agency with the patience and persistance to seek a solution. If democracy is not to dissappear then those to whom we have entrusted the duty of making our laws must be alert to prevent our heritage of freedom from being frittered away."

However, vituperation, pious invocations of the rule of law, nor even coldly judicial forecasts of doom, have been able to arrest the growth of this phenomenon, and its very persistence in the face of powerful organized opposition indicates the fundamental need for chep and expeditious implementation of the social and economic legislative schemes of the day. It is significant that the Committee on Ministers' powers, on which the practicing profession was well and ably represented, acquiesced in the inevitability and even the desirability of such bodies. As justification for the widespread delegation of Parliamentary powers and the attendant growth of implementing tribunals, the Committee laid down the following principles;

I. The pressure on the time of Parliament is great. The more that procedure and subordinate matters can be withdrawn from detailed Parliamentary consideration, the greater will be the time which Parliament can devote to the consideration of essential principles of legislation.

2. The subject-matter of modern legislation is often of a highly technical nature. Apart from the broad principles involved, technical matters are different, hard to include in a bill since they cannot effectively be discussed in Parliament.

3. If large and complex schemes of reform are to be given technical shape, it is difficult to work out the administrative machinery to insert in a bill all the provisions required in time; it is impossible to forecast all the possible contingencies

and local conditions for which provision must eventually be made.

4. Delegation (and administrative tribunals) provide for a constant adaptation to unknown future conditions without the necessity of amending legislation. Flexibility is essential. Delegated legislation permits of the rapid utilization of experience, and enables the results of consultation with interests affected by the operation of the new act to be translated into practice.

5. The practice, again, permits of experiment being made and thus affords an opportunity, otherwise difficult to ensure, of utilizing the lessons of experience.

6. In a modern state there are many occasions when there is a sudden need of legislative action. For many such needs, delegated legislation is the only convenient or even possible remedy."

The Committee's Report continued, " in cases where justice can only be done if it is done at a minimum cost, such tribunals, which are likely to be cheaper to the parties, may on this ground be preferred to the ordinary courts of law.---- In addition, they may be more readily accessible, freer from technicality, and where relief must be given qickly, more expeditious. They possess the requisite expert knowledge of their subject- -a specialized court may often be better for the exercise of a special jurisdiction. Such tribunals may also be better able, at least than the inferior courts of law, to establish uniformity of practice."

It is not intended to debate the respective merits of statutory tribunals and courts of law in dealing with the vast new subject-matters daily growing in scope and variety, in this, a purely legal paper. The above random citations are intended merely to illustrate in a peremptory fashion, the extent and nature of the differences in approach and outlook with which the grwowth of this phenomenon may be greeted.

Regardless of our view of the desirability of the great proliferation of administrative law and its accompanying

implementing bodies, all the evidence leads to the inescapable conclusion that they are here to stay, a subsisting feature of our Twentieth Century way of life.

As has been intimated, the main problem that has been distilled from the original casus belli has been the nature and extent of the supervision that courts of law may exercise to restrain and correct abuses and excesses of these tribunals. The first answer that suggests itself is, " If Parliament has set up under statute a tribunal with jurisdiction to exercise certain delegated authority, who are the courts of law to impose their judicial wills in the matter, to invade, in effect, the field properly belonging to the legislature?"

The examination of this question is really the subject of this paper.

Chapter II. margins - see p. 25 11(a)

CONSTITUTIONAL ASPECTS OF REVIEW

I. General

Even in a unitary state without a written constitution it is impossible in theory for the legislature to completely exclude the jurisdiction of courts of law. The doctrine of ultra vires can not be rendered abortive by statute, because the statute in creating and delineating the jurisdiction of the tribunal cannot in logic bestow upon the tribunal the power to say when it is or is not acting within that jurisdiction. The same principle is applicable under a federal system of government, particularly where the distribution of legislative power is contained in a written constitution. The courts have the inherent power to review legislation to determine whether it has been validly enacted in terms of the grant of legislative power under the constitution. Obviously, even if the statute contains an express clause purporting to deprive the courts of the power of review, a decision of the court that the statute is itself ultra vires will have the effect of rendering nugatory the privatory clause.. The courts must be allowed to say then, in the first instance, whether a provision purporting to transfer jurisdiction from courts of law to administrative tribunals is contained in valid legislation.

The principle is too well established to require much elaboration, but the following illustrations are enlightening. In 1937, the Province of Alberta passed the Debt Adjustment Act. S.3 provided for the setting up of a Debt Adjustment Board to consist of one, two, or three members appointed by the Lieutenant Governor in Council. The powers of the Board could be exercised by any single member or by any person designated by the Board with the approval of the Lieutenant Governor. S.6 gave the Board powers to make enquiries with regard to the property of any resident debtor. S.8(I) in sweeping terms, prohibited suit, action, execution, foreclosure, etc. against a debtor as defined by the Act, unless the Board or any person designated by the Board issued a permit in writing consenting thereto.

Here we have a provincial legislature purporting to deprive the subject of access to the courts or qualifying his right of access thereto, and making the execution of the courts' mandates dependent upon administrative fiat. The court could not, of course, attack the legislation on these grounds, but it could and did, on the basis that the subject-matter of the legislation was not within the legislative competence of the province, but fell rather within a subject-matter assigned exclusively to the Dominion Government under the British North America Act, "Bankruptcy and Insolvency". (A/G Alberta v. A/G Canada,1943 A.C. 356).

In the same year, the same legislature passed the famous three bills, one of which was "An Act to Amend and Consolidate the Credit of Alberta Regulation Act." A Board is set up by the statute, the first members being named by the statute and their successors appointed by the legislature. The Board was to appoint a provincial Credit Commission charged with the administration of Alberta credit. S.2(a) defines Alberta Credit as the "unused capacity of the industries and people of the province to produce wanted goods and services." Machinery to be administered by the Commission was set up to accept deposits of currency and securities to transfer credit, to receive deposits. It could convert currency and negotiable instruments on demand into Alberta credit, could issue credit vouchers in payment of consumers' devidends, etc. The Supreme Court of Canada held that " credit, as a medium for effecting the exchange of goods and services, and the machinery for issuing and circulating it, are among the matters assigned to the Dominion Government under s. 91, and not among those intended to be assigned to the provinces under s.92. (Reference re Alberta Statutes 1938 SCR 100, per Duff C.J.)

The Ontario Legislature passed a statute purporting to abrogate certain power contracts. After a judgement of the Ontario Supreme Court had declared this statute invalid, the legislature passed a further act declaring the meaning and effect of the earlier enactment respecting the prohibition of suits against the Power Commission without the consent of the Attorney General. The

statute came into effect before the hearing of the appeal. The judgement on appeal of Middleton,JA contained the following, "The intentions of the legislature are embodied in the formal act of Parliament amd can only be gathered from the words used in that enactment. The legislature in matters within its competence, is unquestionably supreme, but it falls to the courts to determine themeaning of the language used. If the courts do not determine in accordance with the true intention of the legislature, the legislature cannot arrogate to itself the jurisdiction of a further appellate court and enact that the language used in its earlier enactment means something other than the court has determined. It transcends its true function when it undertakes to say that the language used has a different meaning and effect to that given to it by the courts, and that it always has meant something other than the courts declared it to mean."

In the second case, a British Columbia court declared part of the BC Coal and Petroleum Products Control Board Act of 1937, to be ultra vires. An interim injunction was granted based on findings of a commissioner under the Public Enquiries Act(BC). The BC Court of Appeal continued the injunction , taking the view that the commissioner's report was admissable only insofar as it concerned the alleged purpose of the statute. The legislature now stepped in, amending the statute by s. 42, which stated in effect, that no report was to be referred to in construing the statute or in ascertaining its purpose, intention, scope, or effect, and providing, further, that the section was to be retroactive in effect. Both the Court of Appeal and the Supreme Court of Canada ignored the amendment in considering judgement. In the Supreme Court of Canada, Davis J. referred to the amendment and the words of the Attorney General who had appeared at trial, "a legislative body cannot support an act attacked as being ultra vires by denying to a citizen access to the courts for the purpose of attacking the legislation or by denying to the courts access to the evidence." (Home Oil Distributors Ltd. v. A/G BC 1940 SCR 444).

These cases represent the ultimate perhaps in judicial pronouncement respecting the proposition that the question of ultra vires is one to be determined solely by the courts of law. A legislature can make a man a woman, but it cannot prescribe rules for interpretation of one of its acts after such act has been judicially attacked on jurisdictional grounds. This question will be further discussed later when examining purported judicial exclusion in respect to the use of the prerogative writs, by the legislature.

NOTE ON SEPARATION OF POWERS RE JUDICIAL REVIEW

The subject of separation of powers will be examined post under other aspects of the subject of this paper,but as it is a constitutional concept, it is considered that a word should be mentioned at this point on this venerable but durable fallacy. We find a large segment of otherwise informed opinion including many practicing lawyers, who still believe that this principle is embodied in the Canadian "Constitution". Legislative, executive, and judicial powers,i.e. the powers to make, enforce, and interpret law,are contained in watertight compartments, vesting in separate and distinct organs of government.

The Report of the Committee on Civil Liberties to the Annual Meeting of the Canadian Bar Association, I944, after stating the doctrine of separation of powers and developping argument against the exercise of legislative power by order-in-council, quoted Ridges (Constitutional Law of England 6th. ed. 25)."That the executive has no arbitrary power over the subject, and that the latter has under common law or statute certain rights which cannot be invaded by executive action without his having the right to invade the aid of the courts." The Report continues," though the BNA Act does not say in terms that all the difficulties arising in the interpretation and application of the laws are to be left to the ordinary courts, a mere look at sections 96 to IOI inclusive as to judicature, and sections 9I to 95 as to legislative powers, suggests a strong inference to that effect."

However, it is very significant that the only judicial

authority cited by the august committee in support of their thesis is one of a series of cases decided by the Court of Appeals of the State of Maryland, (where an act was held unconstitutional as an attempt on the part of the legislature to exercise judicial power), the said decisions being based directly on Article 8 of the American Declaration of Rights, which has no counterpart in this country.

From time to time, it is possible that dicta of Canadian courts which appear to support the existence of the doctrine as an active judicial force. We find Davis J., in A/G for Alberta v. Winstanley stating "The Debt Adjustment Act of Alberta is an administrative body and is not validly constituted to receive judicial authority." It is extremely questionable that he intended to pronounce that a legislature can only delegate legislative authority to a body created by it. There is, however, some justification for the view as the alternative interpretation would be inimical to the clear view held generally now that the type of function that is exercised by a body is a question of fact in each case. In any event, the pronouncement can only be dicta as it is apparent from the judgement that the ratio decidendi was the incomptence of the provincial legislature to pass an enactment upon a subject-mateer within the exclusive jurisdiction of the Dominion, (i.e. debts).

It would seem obvious that, if this doctrine was in fact embodied in the fundamental law of the constitution, i.e. the law of the land, that a court of law would have to rule as invalid any legislation purporting to transfer judicial powers to administrative bodies. This is not so, of course. It is sufficient at this stage to enunciate the proposition that the doctrine of separation of powers, to which lip-service has been paid for so long, ceased to be valid, if indeed it ever was valid, with the victory of the English Parliament over King Charles I.

Acting within its duly appointed sphere, (in Canada, the BNA Act), the legislative power is supreme. The impossibility of the doctrine will be amply demonstrated when we survey, in other contexts, the vast "twilight zone" where the identity of legislative, executive and judicial functions become the subject of the most arbitrary definition.

3. Delegation of Powers

The power of the courts to rule on the validity of the delegation of legislative authority from a provincial to the Federal Government and vice versa, is a significant weapon in the 'judicial armoury".

Earlier, there was some dispute even respecting the extent to which a provincial government could delegate authority of a legislative character to a subordinate agency of its own creation. The first affirmation of this power by a superior court would appear to be Hodge v. the Queen (1883) AC 117, where it was held by the Privy Council that the Ontario Legislature could validly delegate to a Board of Police Commissioners authority to make regulations for the good management of taverns.

Since Hodge v the Queen the delegation of legislative powers from a provincial legislature to bodies of its creation has become a commonplace, and indeed it is difficult to envisage the carrying on of modern government without widespread powers of this type.

However, the first World War witnessed the astonishing phenomenon of the Dominion Parliament validly delegating to the Governor General in Council powers to make regulations which had the effect of overriding subsequent express statutes of Parliament itself. S. 6 of the 1914 War Measures Act authorized the G.InC. to make such orders and regulations as he deemed advisable for the security, defence, peace, order, and welfare of Canada. Ss.(2) declared "all orders and regulations made under this section shall have the full force of law and shall be enforced in such manner and by such means, courts, officers, and authorities as the G in C may prescribe." The Military Service Act of 1917 provided for call-up exemptions. In 1918, the G in C passed an order under which, in certain circumstances, exemptions permitted by the Military Service Act would cease. The order was attacked as being ultra vires in view of the Military Service Act. The Supreme Court of Alberta said, " orders and regulations made by virtue of a delegated authority

from a legislature are open to review by the courts and are invalid if they do not come within the powers conferred by the legislative enactment, that is, if they are not merely ancillary, subsidiary, and subordinate to such enactment and passeed for the purpose of the more convenient and effective operation thereof, or are inconsistent with the direct enactments of the legislature which conferred the delegated power----" The Order in Council was accordingly declared invalid (re Lewis, 4I DLR I). However, shortly afterwards, the Supreme Court of Canada overruled this decision in Re Gray, stating "The true view of the effect of this type of legislation is that the subordinate body, in which the law-making authority is vested by it, is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virture of the antecedent legislative declaration that they shall have the force of law." The Privy Counsil concurred in upholding the order as valid, in effect superceding the express provisions of an Act of Parliament. The writer believes there are grounds for argument that the effect of the Military Service Act, by rules of statute interpretation, was to abrogate the effect of the preceding act (the War Measures Act), to the extent necessary to give the subsequent act full force, and that consequently, the power of the Governor in Council to legislate under the War Measures Act would be correspondingly abbreviated. In any event, in view of re Gray, there is certainly justification for the belief that, if Parliament can delegate power to the G in C to override its own express statutes, then a fortiori, it could delegate legislative authority on the sovereign legislatures of the provinces, and conversely, that the provinces could validly delegate legislative authority to the Dominion. However, there is more than a little doubt that this can be done in view of recent case development.

The 1927 Revised Statutes of Canada contained a statute called the Live Stock and Livestock Products Act, which provided inter alia, for regulation of the purchase and sale of eggs. Apparently, the Saskatchewan Government was somewhat leary that this Federal statute was ultra vires, because that august legislative body passed an act of its own, the Live Stock and Levestock Products Act of Saskatchewan, s. 2 of which read in part " insofar as

as any provision of an Act of the Parliament of Canada entitled the Livestock and Livestock Products Act----is within the legislative authority of the province---such provision shall have the force of law in Saskatchewan---and shall remain in full force and effect therein---until the same is repealed by the Dominion Parliament or revoked by the Governor in Council as the case may be."

In other words, the provincial legislature purported to validate within the province any part of a Dominion statute that should prove to be ultra vires the Federal Parliament. The Saskatchewan Court of Appeal found both the Federal statute and the provincial statute (s.2) ultra vires. The Chief Justice cited Lord Watson in CPR v. Notre Dame de Bonsecours, 1899 AC 367, "The Dominion cannot give jurisdiction or leave jurisdiction with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction."(R.V. Zaslavsky 1935 3 DLR 788).

In the same year as the Zaslavsky Case an attempt was made at "joint legislation". The Natural Products Marketing Act was passed by the Federal Parliament, each province passing a provincial Marketing Act designed to fill in the blanks in Dominion legislative power, in relation to the subject-matter. Lord Atkin, in ruling the Federal Act ultra vires, stated that joint legislation would have to be very carefully framed, neither pary leaving its own spheres and encroaching upon the other.

In 1936, the Alberta Supreme Court ruled invalid the Alberta Reduction and Settlement of Debts Act because of an unlawful delegation of legislative authority under s.I2 thereof, which purported to empower the Lieutenant Governor in Council to declare any debt was a debt to which the Act applied or did not apply. Harvey, CJA, stated in judgement, "It is apparent that the authority to make regulations in order to make legislation enacted by the legislature completely effective is quite a different thing from authority to make an independent enactment." It is instructive to compare this

case with the decision in Re Gray.!

There is further authority which appears to support the Zaslavsky Case (x), at least on a cussory reading. In "In Re the Initiative and Referendum Act", Lord Haldane stated that "--while no doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoied by provincial governments in Canada could, while preserving its own capacity intact, seek the assistance of subordinate agencies as had been done in Hodge v. the Queen----but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence." This appears to amount to an adoption of the distinction which had been drawn in Re Gray between "delegation of powers" and "abdication of powers". It is difficult to understand the views of those who cite Re Referendum as an authority supporting R. v.Zaslavsky, as there is no evidence that the Saskatchewan Legislature in any sense surrendered its sovereignty or failed to maintain its legislative capacity intact within the meaning of Viscount Haldane's reasoning. It is true that indirect power was given to the Federal Parliament to render the provincial act nugatory, but the provincial legislature always retained the power to revoke the act. Surely that power alone should be sufficient to effectively prevent any form of "abdication". Professor Wahn, in a note ot the I936 I4 Can.Bar Rev., draws attention to Re Canada Temperance Act I935 SCR 494, in this behalf. The Canadian Temperance Act empowered the Governor General in Council to suspend the operation of part of the Act, the suspension to " continue as long as the provincial laws continue as restrictive as aforesaid." The Prov. of Ontario passed an Act judicially held to be less restrictive than the Canada Temperance Act and it was held that the provincial act had lifted the suspension in certain Ontario counties,i.e. a provincial act revoked effectively a Feder al PC. Why then, couldn't the Province of Saskatchewan give to the Dominion Government a power to revoke provincial laws? He states further, that the Saskatchewan act need not be considered as delegation at all. "Delegatus non potest delegare" does not apply to the Crown,"within these limits and area the local legislature is supreme." He further cites Lord's Day Alliance v. A/G for Manitoba I925 AC 384. The Federal

Lord's Day Act prohibited paid Sunday excursions,"except as provided by any provincial law now or hereafter in force." A subsequent provincial act of the Province of Manitoba purporting to legalize Sunday Excursions was held intra vires,<u>by virtue of delegation given under the Federal Act</u>.

Professor Tuck, with a conviction shared by the writer, states in an article in 1945 Can Bar Rev. p. 92, that, once the principle is acknowledged that a legislature may delegate, and such a principle has clearly been accepted since Hodge v. the Queen, then why should the legislature be restricted in its choice of agents or delegates? "It should be able to nominate whom it pleases whether it be a provincial board, the Lieutenant Governor in Council, (held valid in Re Natural Marketing (BC)Act)----or a committee of expert economists from Great Britain, or even the Dominion Parliament."

The Hodge Case held that, within the limitations of the BNA Act, the local legislature is supreme, and has the same authority as the Imperial Parliament---to confide to a ---body of its own creation, to make by-laws or resolutions with the object of carrying the enactment into operation and effect." All English statutory rules operate by derivation from the legislation of the Imperial Parliament. If a provincial legislative body has the same power as the Imperial Parliament in this respect as stated in the Hodge Case, then it should be able to delegate to the Dominion Parliament or any other agent the exercise of a power conferred by the BNA Act. No abdication could be held to exist in the Zaslavsky Case; as a matter of fact, the dissenting judgment in the case claimed that the enactment constituted an "assertion of authority rather than an abdication or repudiation of it."

The courts presumably permit "incorporation by reference" on one hand but prohibit "abdication" on the other. The terminology seems clear enough,but in practice there exists a vast "twilight zone", where the difficulties of distinguishing between these two vest the court with a broad area of interference on the grounds of "invalid delegation of powers". If the kind of delegation attempted in the Zaslavsky case is invalid, it would appear to be nothing short of the truth to postulate at this time, that intergovernmental delegation of powers in Canada is invalid. Professor Laskin

in "Canadian Constitutional Law", note, p.25, definitely takes the view that the courts have said no to this class of delegated legislation. The point is considered open by Prof. Corry, and, to a certain extent, by Prof. Willis. Professors Hahn, Tuck, and Scott believe that there is no valid bar to any legislature nominating any ad hoc delegate, including, of course, the Federal Government. It is significant that neither R.v. Zaslavsky nor the other two Saskatchewan cases in point went up to the Supreme Court of Canada, and it is believed that that Court, if confronted squarely with the issue, would feel compelled to overfule these cases on the principles anunciated above.

S.96 of the British North America Act

S.96 states, "the Governor General in Council shall appoint the Judges of the Superior, District, and County Courts." While, on the face of it, this appears to be a completely innocuous provision, it has been the "thin edge of the wedge" of judicial attack, on constitutional grounds, on the setting up of provincial boards and tribunals. In fact, a close survey of the decisions would appear to indicate that in the majority of cases where courts have invalidated legislation setting up provincial agencies, they would have been on substantially firmer ground to have designated the tribunal as a "court" within the meaning of this section, than deal in terms of the more abstract comcepts with which we shall become acquainted.

The nature of the problem was ably posed in O.Martineau and Sons v. Montreal 1932 AC 398, in considering the validity of a provincial board: "is it a superior Court or a tribunal analogous thereto?"

Re Adoption Act 1938 SCR 398 contains the following disquisition on the subject. "Now, it seems to be indisputable that ss.96 and 97 of the BNA Act contemplate the existence of provincial courts and judges other than those within the ambit of s.96. Indeed, it would be a non-natural meaning in these ss. to construe them as applying to such courts of summary jurisdiction as magistrates or Justices of the Peace." Duff CJ reviewed the history of s.96 in respect to magistrates' jurisdiction, and showed how the courts had first taken the view that, at the passage of the BNS Act, there

was no transfer of prerogative power to the provinces and consequently, the prerogative appointment of magistrates even lay with the Dominion Government. In Ganong v. Bayley, 2 Cart. 509, the Supreme Court of New Brunswick upheld provincial legislation setting up a Board of Commissioners with jurisdiction in small debts. A strong dissenting opinion in this case was supported later by the majority decision in Burke v. Tunstall 2 BCR I2, the BC Court of Appeal holding that a provincial legislature might validly create mining courts and fix their jurisdiction, but could not appoint an officer thereto with other than "ministerial" powers. In Reg. v. Coote LR 4 PC 599, the Privy Council held valid Quebec legislation appointing "fire marshalls" with power to examine witnesses under oath, and to arrest and commit for trial like a magistrate. The Supreme Court of Ontario, in Reg. v. Bush went along with the latter decision and the majority in Ganong v. Bailey, per curia, " the administration of justice in the provinces could not be carried out effectually without the appointment of justices and police magistrates, and the conclusion seems to me to be irresistable that it was intended that the appointment of these and other officers whose duty it should be to aid in the administration of justice should be left in the hands of the provincial government." The question of whether provincial legislation in respect to the prerogative was valid was finally decided in the Maritimes Banks Case I892 AC 437, and decided in favour of the provinces. The Privy Council dealt with the line of reasoning typified in Martineau v. Montreal, holding that the power of appointment in s. 96 was general, in view of the sec. of the Act specifically excepting from the operation of the clause, the probate courts of Nova Scotia and New Brunswick.

Duff, CJ, in the Re Adoption Case does not agree, anyway that ~~the Martineau Case~~ Burke v. Tunstall was authority for the proposition that it is incompetent to the provincial legislature to legislate for the appointment of a provincial court officer exercising other than "ministerial" functions. He stated that s.I29 of the BNA Act provided for the continuance of courts possessing civil jurisdiction which did not fall under s.96 and whose jurisdiction was

Suggested erratum- it would appear that Duff CJ was referring, in Re Adoption to Burke v. Tunstall and not the Martineau Case.

competent to the province under s. 92(14). He went on to cite numerous cases where magistrates' courts had civil jurisdiction in 1867, and concluded "---the provinces became endowed with plenary authority under s. 92(14) but, a province is not empowered to usurp the authority vested exclusively in the Dominion in respect of the appointment of judges, who, by the true intendment of the sec. fall within the ambit of s. 96, or to enact legislation repugnant to that sec.; and it is too plain for discussion that a province is not competent to do that indirectly by altering the character of the existing courts outside that sec. in such a manner as to bring them within the intendment of it while retaining control of the appointment of the judges presiding over such courts. That, in effect, would not be distinguishable from constituting a new court, as, for example, a Superior Court, withi the scope of s.96 and assuming power to appoint the judges of it. In principle, I do not think it is possible to supoprt any stricter limitation upon the authority of the provinces...."

The foregoing statement has been consistently reflected in the decisions dealing with provincial competence in increasing the civil jurisdiction of magistrates.

From the discussion to this point, it will have been ascertained that, but for the existence of s.96, the provinces could reorganize their entire curial machinery; in substance this could mean depriving the present courts of their functions and jurisdiction and revesting them wholesale in administrative tribunals, in effect, aboliqhing the entire civil jurisdiction.

The court decisions reflect a solicitude to maintain a balance between the desirability giving effect to provincial legislation setting up cheap and expeditious agencies to carry out social programming and control, and the necessity of maintaining effectively the bulwark of s.96 against the inroads of legislative onslought on the "rule of law".

The Privy Council, in considering the validity of the constitution of the Ontario Municipal Board, Toronto v. York 1938

AC 415, held that "so far as the Act (the Ontario Municipal Act), purports to constitute the Board a court of justice analogous to a Superior Court...it is pro tanto invalid." (It held the Board validly constituted, however, as being an administrative board, on application of the"Pith and Substance" rule.) In this case, the Supreme Court of Ontario had stated, per Rowell CJO, " the province is not competent to confer upon a tribunal created and appointed by it, power to determine purely judicial questions, such as are normally determined by courts of justice." Lord Atkin asked whether the Board was validly constituted to receive judicial power." "Judicial power" would necessarily have to refer to the judicial power of a "Superior, District, or County Court", and not judicial power as exercised by courts generally, particularly inferior courts, for the above decision to rest validly on s.96. The quotation introducing this section would appear to make abundantly clear that the decision was, in substance, that the Board was not a court within the meaning of s. 96 .

In view of the frequently elaborate procedures and multiple functions of a tribunal in operation, the question that inevitably arises, in considering whether a board is validly constituted, is "what factor or factors should be considered paramount in determining the essential nature of the board?" (I). Specifically, if the tribunal is being attacked under s. 96, the questions would go (a) is the tribunal exercising judicial functions? and, (b), if the answer to (a) is in the affirmative, "are the judicial functions essentially the same as those performed by a Superior, District, or County Court before the coming into force of the Act ?"

"It has come to be commonly held, that, in respect to municipal institutions, highways, railways, public utility acts dealing with water, gas, electricity, telephones, and other matters of a similar nature, the board is entrusted with duties of supervision and decision which are purely administrative ".(2)

<u>Thecourt continued, "however, whatever be the definition given</u>

(I) see post, especially under "characterization of the nature of the function".
(2) Toronto v. York, (supra)

to "courts of justice" or "judicial powers", it would appear that ss.4I to 46,and 54 to 59 (of the Municipal Act),purport to clothe the Board with the functions of a court, and to vest it with judicial powers. But, making that assumption, it does not follow that the Board is therefore, for all purposes, invalidly constituted. So far as legislation has purported to give it judicial authority, that attempt must fail. It is not validly constituted to receive judicial authority. So far as the Act therefore,purports to constitute the Board a court of justice analogous to a Superior Court,it is pro tanto invalid, not because the board is invalidly constituted, for as an administrative board its constitution is within the provincial powers, nor because the province cannot give the judicial powers in question to any court,for to a court complying with the requirements of ss.96,99,and IOO of the BNA Act the province may entrust such judicial duties as it thinks fit, but, because to entrust these duties to an administrative board appointed by the province would be to entrust them to a body not qualified to exercise them by reasons of the sections referred to."
The court found that the judicial functions were, in fact, severable, and has no legal effect. The court observed further, that powers of examination,inspection and discovery of documents,even though prima facie necessary corollaries of courts of justice,were not inconsistent with the powers of an administrative body, who were called upon to ascertain the facts in relation to the subject-matter with which they were dealing.

The other Privy Council case in point ,Martineau v Montreal 32 AC II3, turned upon the question whether the president of the Montreal Public Service Commission was performing duties which properly belonged to a Superior or County Court Judge in fixing compensation for lands expropriated by the City under the charter of the City of Montreal. The court examined the nature of his junctions and determined that he was not acting judicially. Under the expropriation statutes before and after Confederation, the function of determining compensation was always vested in commissioners, and not in judges, so that this procedure would now be valid by virtue of s.I29 BNA Act (I)

(I) S.I29 provided for the continuance of existing courts, commissions,officers,laws,etc,in force at Confederation

A provincial act which purported to constitute a commissioner appointed by the Province a "court of record" and to confer upon him the jurisdiction of a superior court, was ultra vires to that extent, but, as the Utilities Act was essentially administrative in nature, the invalid provision would be severable.(Re Public Utilities Act; Winnipeg Electric Railway v Winnipeg I9I7 I WWR 9.).

It is interesting to note the extent to which courts will sometimes go to sever invalid legislative provisions, and yet substatially save the statute. It was held in R.v.McKeowan I935 OR I09, that a commissioner might lawfully remain in office although some of his most material powers under the governing statute (Ontario Municipal Act) were invalid as being ultra vires the provincial legislature. A quo warranto was dismissed.

A Compensation Board set up under the Manitoba Workmens' Compensation Act was held to be an administrative board and not a Superior Court within the meaning of S. 96; the appointment of its members by the Lieutenant Governor pursuant to the provisions of the Act was held to be intra vires. (Kownski v.Tremblay 5I DLR)

Professor Willis, in commenting upon Workmens' Compensation Boards in the subject behalf, posed the question, "Is it (the Board) deciding accident disputes between employer and employee.....or is it administering an insurance scheme for workmen and incidentally deciding the same sort of question that every insurance adjuster has to decide?" i.e. what is the "pith and substance" of its functions? He goes on to say, "neither court attributed any importance to the fact that the Board was dealing with a subject-matter which had previously been reserved exclusively to the superior court." He concludes that the boards in question (one being that in the Kownski Case above-cited),although dealing with the same subject-mattor as had previously been exclusively within the jurisdiction of superior courts, were dealing with it from a wholly different point of view. It is contended that the Supreme Court in considering Kownski v. Tremblay did, in fact take into account and accept as a basis for their decision, the question as to

whether the jurisdiction now exercised by the Board was one that had been wholly exercised formerly by a superior court, regardless of the point of view from which it was, in fact, being exercised. The Can. Abridgement report states, "No portion of the jurisdiction formerly exercised by the courts has been transferred to it (the Board)". I find further support for this contention in Re McLean gold mines v. A/G for Ontario 54 OLR 573. The Mining Act of Ont., as amended in 1921, gave to the Mining Commissioner jurisdiction to make certain orders which could formerly have been made only by the Supreme Court. On an appeal from an order made under these powers, it was held that the order must be set aside. This case was applied in R.v.Louis 1929 I WWR 945, and cited with approbation in Brampton v. Hutchinson in 1950 (1950 OWN 419).

Assuming that the court has found that the tribunal was acting judicially, and was, in fact, a court, the next pertinent query is, "Is the court a Superior, District, or County court?"

It is clear that a provincial legislature may increase validly the pecuniary, or territorial limits of a provincial tribunal. There is no "appointment of judges" involved in these cases, so as to offend s.96, as the tribunal is an existing tribunal at the time its jurisdiction is thus extended. The courts have already been validly constituted and the judges thereof validly appointed. If the above proposition were not true, obviously the increase of say, the pecuniary limits of a Division Court to the amounts of a County Court, would be invalid. The point is dealt with at length in French v. McKendrick I DLR 696. "...nor does the fact that the legislature has increased the jurisdiction of the Division Court so as to bring it within amounts which at confederation were in excess of that amount, make them County Courts within the meaning of s.96. In s. 96, the courts are mentioned by name and nothing is said as to the extent of their jurisdiction or as to the kind of cases they have to try."

This principle as applied to territorial jurisdiction was dealt with in R v. Brown 1907 41 NSR 293, where a provincial statute was held valid which provided that in case of a vacancy in the office of judge for any County Court District, the Lieutenant

Governor in Council might appoint the judge of any other district to act during the whole or any part of such vacancy. Townshend J. said "It is not the appointment of a judge, but simply the extension of the district over which a judge, duly appointed, shall exercise his jurisdiction." The same principle was enunciated by Duff CJ in Re Adoption Act and in Re County Courts of BC 2I SCR 446.

It is clear then, as a general principle, that increases in territorial or pecuniary jurisdiction do not per se render a tribunal already in existence a superior court. However, even here a word of caution is necessary. There is argument that the proposition is based on a difference in degree, e.g. an increase of pecuniary jurisdiction from $200 to, say, $IO,000 would constitute in effect, a substantially different court, although of course, the argument would still be valid that the change did not involve the appointment of a new judge even though his jurisdiction would, by any standard, be that of a superior court. Riddell JA said in the French Case that any monumental increase might have the effect of rendering the tribunal in question a superior court, "It may, indeed, be sometimes a question whether the extension of jurisdiction might not make a court a superior court, but no such question arises here." If such a "monumental increase" did, in the opinion of the court, jake a tribunal a superior court, presumably the inference is that the judge of that court would have to be specifically appointed as such. The question would certainly appear to be open.

There is a complete dearth of authority on the question previously posed, i.e. "when a tribunal has been found to be a court, when is it a superior court within the meaning of s.96?" The case would appear to call for application of the pith and substance rule, i.e. is there a preponderance of those material functions which previously belonged to a superior court over that were not? Prof. Willis has suggested that a court is a superior court if its decisions must be made a rule of court to take full effect, or it has the power of supervision and control over other tribunals "so

characteristic of a superior court". It seems extremely unlikely that an administrative body would ever be set up with jurisdiction to supervise inferior tribunals. It is significant that a Rentals Appeals Court was not attacked under s.96, but soley on the grounds that it was amenable to curial correction as a body exercising judicial functions (??), under the prerogative of the court. The Quebec Workmans' Compensation Board was unsuccessfully attacked on the grounds that it was a superior court, (A/G Que. v. Slaneo and Grimstead 2 DLR 289), where it was held that, even if it could be described as a court, it was not a superior court, nor a district or county court.

To sum up, it would seem to be conclusive that the transfer of jurisdiction to a provincial tribunal to determine exclusively some question that is usually determined by a superior court, is invalid (McLean Gold Mines Case). It is incompetent to increase the jurisdiction of an inferior court existing in 1867 so as to constitute it in fact a "superior, district or county" court (Re Adoption Act). It is incompetent to set up a tribunal subsequent to Confederation with jurisdiction to determine any question of a type which in 1867 was normally determined by a s.96 court (McLean Case and also Toronto v. York). It is competent of course, to a provincial legislature to increase the pecuniary oor territorial jurisdiction of provincial tribunals to cover part of the jurisdiction previously held by s. 96 courts.

As we have seen, however, there is some dispute as to the extent to which courts will countenance partial transfer of jurisdiction by application of the pith and substance rule, which prospectively augurs considerable amelioration of the hard and fast limitations proposed above. As we have seen, too, there is some dispute as to the extent to which the courts will entertain the proposition that, although the newly-constituted tribunal is adjudicating in repect to the same subject-matter as lay within the competence of 1867 s.96 courts, they were dealing with it from a different point of view. (A/G Que. v. Slaneo and Kowanski v. Tremblay).

Chapter 2.

PREROGATIVE REVIEW

I. General

Up to this point, we have reviewed the nature of constitutional lines of attack on the transfer of jurisdiction to statutory tribunals. We have found that these lines of attack develop through (a) the general jurisdiction of courts of law to rule invalid the legislation containing the setting up of the statutory tribunal; (b) the jurisdiction of the courts to rule invalid legislation contravening constitutional limitations on powers of inter-governmental delegation; and ,finally,(c), the jurisdiction of courts of law to review provincial legislation to determine whether the tribunal set up thereunder is a court within the meaning of s.96 BNA Act.

Assuming that the legislation in question has surmounted the constitutional hurdles detailed in this paper to date, it is still subject to review by the courts under their common law prerogative power,exercisable through the writs of mandamus,certiorari, prohibition,etc.

2.The Prerogative Writs (X)

The principle prerogative writ is that of certiorari. The word is the present infinitive passive of certiora, meaning, in judicial Latin, "I inform". In theory, the Sovereign has been appealed to by a subject complaining that an injustice has been done him in an inferior court; whereupon the Sovereign says that he wishes to be informed (certiorari) of the matters and record of the inferior tribunal, and orders that they be produced in a court in which he, the Sovereign sits. Logic would seem to demand that an inferior court with limited powers should be amenable to a highe tribunal if it abuses or exceeds its own jurisdiction, and it is,of course, a superior court where the Sovereign sits in theory, to which the tribunal is answerable.

Blackstone's Commentaries (v.4 p.IO), speaks of Prohibition,"....directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof...upon a surmise either that the cause originally , or some collateral matter arising therein, does not belong to that jurisdiction , but to the

cognizance of some other court."

Mandamus lies where there is a specific legal right, usually statutory, and no specific remedy for enforcing that right, or, even sometimes, where there is a legal remedy but it is excessively cumbersome and ineffectual under the particular circumstances of the case.

The factor that these remedies have in common is their foundation in the common law constitutional position of the Sovereign as the "fountain and source of justice", the writs of certiorari adn prohibition lying to correct abuse or excess of jurisdction in inferior tribunals, that of mandamus lying to enforce a legal right and usually directed to a public agency or statutory body.(1) (The use of these writs in relation ot judicial review of administrative decisiins will be examined at length under "Curial machinery" (post).)

Injunctions have been granted as remedies in a number of Canadian cases, and as the mechanics of this remedy will not subsequently be the subject of comment, afrw words are in order here. There is a definite advantage in using injunctions where possible in preference to the prerogative writs, insofar as they are applicable to tribunals exercising other than judicial functions. Its use in correcting denial of "natural justice" is more predictable than that of the prerogative writs, being governed by more inflexible rules. Its use in natural justice cases goes back to Rookes' Case and the Keighley's Case (both cited in Bradley v.Barber 1899 30 OR 443), in the latter case it being stated that " a function that is to be exercised according to discretion ,means according to the rules of justice and reason".

Where a Rentals Administrator, purportedly acting under the authority of the Wartime Leasehold Regulations contained in PC 9029, performed an act that conflicted with the War Measures Act, the court found that he had exceeded his jurisdiction and granted an injunction. (Society for the Love of Jesus v. Smart 1944 2 DLR 488).

(1)

The view had long been entertained in Ontario that an application for an injunction coupled with proceedings for a judicial declaration constituted an alternative remedy to certiorari or prohibition, a view that was proved unfounded in Hollinger Bus Lines v. Ont. Labour Rel. Bd. 1951 OR 562. The prospective litigant is now apparently confronted with the difficult task of choosing between the initiation of either declaration and injunction or certiorari (or prohibition). A declaration will not be made in the event that a more expeditious remedy is available. In the Hollinger Case, the court found that the functions of the board were judicial, therefore certiorari would lie, and certiorari being deemed a more expeditious remedy, it was held that declaration and injunction would not lie. Had the court found the function of the board to be administrative, presumably it would have permitted the action for declaration and injunction to have continued. As it is almost impossible to pre-establish the nature of the function, as we shall see hereafter at some length, the position of the litigant is most precarious.

Aside from certiorari, prohibition , and mandamus, other prerogative writs find employment from time to time in the type of proceedings under review.

S. 141 of the Ontario Judicature Act describes Quo Warranto proceedings. "Except in the cases mentioned in ss.144 and 145 (not applicable), all proceedings against any person who unlawfully claims or usurps, or is alleged unlawfully to claim or to usurp any office, franchise, or liberty, or who has forfeited or is alleged to have forfeited any franchise, by reason of non-user or mis-user thereof, which have heretofor been inistituted or taken by writ of quo warranto hereafter shall be instituted or taken, where the proceeding is by the A/G ex officio, by notice of motion calling on the person against whom the proceeding is taken to show cause why he unlawfully exercises or usurps such office, franchise, or liberty."

The summary form in which this remedy may be invoked is parallelled now in the use of the other prerogative writs. Whereas previously they were initiated as writs in an action at law, they are now the subject of summary application by way of notice of motion (Ontario Rule of Practice 622).

Chapter 3

CHARACTERIZATION OF THE FUNCTION OF THE TRIBUNAL

I. General

Why is it important to distinguish between the nature of the functions exercised by different administrative tribunals?

In the previous section, we mentioned that the prerogative remedies most employed in administrative law are certiorari and prohibition, both historically and intrinsically directed to the review on jurisdicational grounds, of inferior tribunals which have traditionally exercised judicial functions. As we shall see in reviewing the earlier cases, the courts frequently failed to make findings as to the nature of the tribunals' functions, but the writs were allowed to go anyway. Latterly, the distinctions have been obscured to a large extent, by the curial characterization of function in many cases as "quasi-judicial", or by pronouncement that the tribunal was under a duty to act judicially, i.e. in accord with the dictates of "natural justice", while acknowledging that the function of the tribunal was primarily administrative.

Despite the foregoing, however, the distinction today still possesses considerable significance, and a court would have more than a little intrepidity in permitting certiorari to run after making a clear finding that the function of the tribunal was purely administrative, especially where the matter in respect to which the application has been made is not a substantial derogation from "natural justice", (in which case, the court would probably say that the tribunal was under a "duty to act administratively".)

Aside from the question of the application of the remedy, the acknowledgement by a court that a tribunal proceeds administratively has the effect, as we shall see, of hardening the mind of the court towards contentions that the applicant has been denied the right to cross-examine, to have documents produced, to receive reasons for the decision, etc.

In the third place, the distinction is important in some cases in respect to ascertaining whether the body under review is a "court" within the meaning of s.96 of the BNA Act.

There has been considerable controversy as to whether

the functions can properly be distinguished at all. Prof. Robson, at p.I4 of his Law and Administrative Justice, states " there does not appear to be any conclusive test by means of which judicial activities can be infallibly distinguished from administrative activities." And again, "at one end of the scale, judges are making certain decisions under conditions and by methods which we can clearly recognize as being of a judicial character. At the other end of the scale public officers are performing other acts marked by equally distinct features of their own; and these we can call administrative functions."

The fact that such an able commentator refers to "distinct features of their own" shows the complexity of the problem. Prof. Robson illustrates from American decisions the ridiculous results that may accrue from judicial attempts to resolve the problem. In Alabama, Massachussets, and Michigan, the courts have held that the action of commissioners of highways or of city coucil in laying out streets is judicial. In Maine and New Hampshire, the same act has been held to be non-judicial when performed by the selectmen of a town, but judicial when done by a court of Quarter Sessions! (I)

D.M.Gordon states that the courts have never acknowledged their failure to find a satisfactory definition of judicial proceedings, but have "to some extent atoned for their failure by ignoring the only definitions that they have been able formulate, and have thus escaped further confusion at the price of consistency."

Dr. Jennings, the noted English Constitutional authority, in the Law and the Constitution, writes," still less must it be assumed that it is possible to distinguish by analysis 'legislative' from 'executive' and 'judicial' powers. Montesquieu made no nice distinction and none of his successors has been more successful in drawing them. It is accepted by a large body of expert opinion that they cannot be drawn."

(I) Most continental theorists e.g. Carre de Malberg in his "Theorie Generale de l'etat", tend to separate the "formal" doctrine of separation of powers from the "material". In the formal the function is judicial if it is exercised by judges; in the material it is judicial if it falls into that class by its very nature. A "material" characteristic of judicial functions has been held to be a dispute between two parties. Courts however deal with a number of things that are not disputes, which are given to judges because of potential litigation.

He goes on to state that it is possible to distinguish certain characteristics of various classes of functions that makes it desirable that they should be exercised for instance, by the judiciary; but there is no single characteristic or grouos of characteristics to enable a legislature to determine whether that function should be assigned exclusively to the judiciary ie. "judicial function".

The Committee of Ministers' Powers were of the opinion , on the other hand, that functions may be distinguished with a reasonable degree of certainty. Their findings in this regard will be considered shortly.

Dr. C.K. Allen testifies that the "differentiation of functions, although not entirely satisfactory from a scientific standpoint, forms a workable guide in practice." Our conclusion is that the distinction may be made roughly in theory, and that, if the principles laid down are conscieniously adhered to in practice, a fairly coherent body af law might be built thereon in time. As to the efficacy , to date, of the distinction between the functions as a"workable guide", the evidence discloses that the persistent refusal of the courts to formulate clear and logical rules and to adhere to them , has resulted in a bewildering morass of confusion.

2. Administrative Tribunals

The functions of an administrative tribunal were judicially recognized after years of obscurity, by Masten JA, in re Ashby I934 OR 42I. "The distinguishing mark of an administrative tribunal is that it possesses a complete, absolute, and unfettered discretion, and, having no fixed standards to follow, it is guided by its own ideas of policy and expediency. Hence, acting within its own proper province, and observing any procedural formalities prescribed, it cannot err in substantive matters because there is no standard for it to follow and hence no standard to judge and correct it by."

Bearing in mind the foregoing description of administrative tribunals let us examine briefly, and at random, the terms of statutory grants of authority to a number of Ontario boards and agencies.

Let us examine the discretion that the Ont. Legislature has seen fit to entrust to the Workmens' Compensation Board under the provincial statute of the same name, being RSO I950 c.430. s.8 prohibits entitlement to

dependents not resident in Canada (with a stated exception). S.8 (2), however, says that "notwithstanding ss.I the Board may award such compensation...<u>as may be deemed proper</u>... S.IO(2) sets out the right of a principal employer to reimbursement from a contractor <u>to such extent as the Board finds</u> the contractor would have been liable." S.II provides that, where the employer is carried on the payroll he and his dependents are entitled to compensation to be determined by the salary or wage <u>which the Board deems reasonable.</u> S.26 provides for advances <u>where the Board is of the opinion</u> that the interest or pressing need warrants it." Under s.32(I) the employer may be required to pay the capital sum in case of permanent disability, in such sum as <u>in the Board's opinion</u> will be sufficient, with interest, etc." S.34 provides for provision for funds to pay increased compensation at such time or times <u>as the Board may deem most equitable and most in accordance with the principles of this</u> Act, etc. " Ss.2 states," where, by reason of limitation of legal liability or other cause, the Board deems it enequitable or inexpedient to apply ss.I, <u>the Board shall have power to exempt the same accordingly</u>." S.36(2) stipulates, "Where <u>in the opinion of the</u> Board, the furnishing of further education appears advisable , the Board may, <u>in its discretion</u>, extend the period, etc." Ss.4 states, "A monthly allowance may be paid to a foster mother....she is entitled to compensation <u>in a manner that the Board deems satisfactory.</u>" By ss.(IO) compensation may be given to others for the benefit of children" <u>where the Board is of the opinion that for any reason</u> ,it is necessary or desirable that a payment should not be made directly to its merant..."

The above instances have been picked haphazardly from the statute. There are numerous other instances where the Board has been vested with Mr.Justice Masten's "complete, unfettered" discretion.

What, then, is the position of a person affected by the provisions of this statute who deems himself aggrieved by a decsion duly made in pursuance of the authority given by one of the foregoing sections? True, the court may look to see if the Act as a whole offends the constitutional principles set out previously in this paper; it may look to see whether the tribunal had made a decision which the occasion called for i.e in view of the situation

that actually existed and with which the tribunal was in fact properly seized under the statute. However, the complaint must usually be that the tribunal exercised its discretion " wrongly" or improperly, that it acted against the evidence, that it acted capriciously, arbitrarily, or unfairly. Where is the "objective standard" in the foregoing statutory provisions by which a court may ascertain whether the tribunal has properly exercised its discretion? Under ss. IO, for example, a parent who has been deprived of the allowance in favour of his or her child, goes to a court of law on certiorari, claiming that he or she is a suitable parent, that the funds are safe in his or her hands (look, haven't I made a million dollars on the stock market?), and that the Board must have acted unreasonably in taking the funds from his hands and giving them into the care and custody of Uncle X? What solace can the court give him, confronted with the " complete, unfettered discretion of the Board?..."where the Board is of the opinion that for any reason, etc.?"

Another example of an Ontario Statute should suffice to illustrate adequately the nature of administrative discretion. Let us look briefly at the Ontario Liquor Licence Act RSO 1950 c.2II. S.I4 provides, '...the Board may make such orders as it may deem proper, etc", and, " the Board may give such directions and issue such certificates as it may deem proper or as may be necessary or incidental to the exercise of its powers."

(I) Workmens'Compensation Boards of the various provinces would appear at first sight to satisfy a preponderance of the requirements set out by Mr. Justice Masten. However, they rule in respect to claims made by individuals against the insurance fund and so are exercising a function previously discharged by courts of law; also, the only manner in which they can provide for the future, is by setting assessment rates; the members, in common with the judiciary, are appointed for a fixed term with security of tenure, may award costs, make their own procedural rules.

The Quebec Board was held to be an administrative tribunal in the Slaneo Case. "The Commission was not a court in the proper sense, but an administrative board lacking many of the powers of courts,as well as many of their distinctive attributes, and possessing certain powers such as those of revising its own decisions and of suing for amounts due to the fund by employees which were foreign to the idea of a court." It is of interest to note that the distinction made was solely between courts and administrative boards. Judicial bodies were not considered as entities in any way dissimilar from courts of law, nor did the court speak of the necessity of acting judicially, or classify the functions as quasi-judicial.

S.I5 states "where <u>in the opinion of the Board</u> any of the relevant circumstances relating to any application heard before it have altered or new evidence in connection therewith has become available the Board may review any order made upon such application." S.I6 provides that the Board shall have power to enforce the attendance of witnesses and the production of documents, but that privileges or the provisions of the Evidence Act may not be claimed by witnesses. S.I7 permits the Board to make such investigations as " it deems expedient for the due administration of the Act even into the "affairs or conduct of any person," and permits seizure of documents, records, etc. needed for the investigation. S.20 provides that the decisions orders, and rulings of the Board shall be final and shall not be questioned, reviewed, or restrained by injunction, prohibition, mandamus, quo warranto, etc. (I). S.2I provides that licences may be issued in respect to a number of classes, and establishments. S.2I(3) allows the Board to restrict the number of licences or any class of licences issued in any capacity.

The only restriction the legislature has placed on the power of the Board to issue licencrs is the express prohibition under ss.28 and 29 which have very limited application.

Again, what power can a court have, in the face of the foregoing provisions, when confronted with an application that the Licencing Board has made a "wrong" decision, has "improperly exercised its discretion"? Where is the necessary "objective standard" against which to assess the "correctness" or "incorrectness" of the verdict, or even whether it was motivated bysheer malice? That the Board was acting unreasonably? But, <u>by what standard</u> it is repeated, is the Board acting unreasonably? By the standard that the tribunal has handed down different verdicts in identical or substantially the same previous circumstances? But, of course, the tribunal is in no sense bound by its previous decisions. It can, in effect, ignore precedent.

(I) S.20 is similar to many other express prohibitions against judicial review contained in an increasing number osstatutes. The courts circumvent the provision in practice by the argument that if a statutory body acts beyond the jurisdiction conferred by the statute, the statute cannot apply at all. In other words, the inferior body can never determine its own jurisdiction.

It acts on policy and expedient which are ever-changing in their implications and ramifications. As stated the statute provides no standard. If the statute made the exercise of the discretion dependent upon the observation of certain conditions precedent, upon the compliance with stipulated procedures, it would be a different matter, and the court would feel itself justified in interfering to insure that the conditions and procedures have been observed in arriving at their decision.

But an applicant on certiorari, complaining of an unreasonable decision, is, in essence, asking the court to apply its own discretion on considerations of policy and expediency in arriving at a "reasonable" decision, in substituting its opinion for that of the legislature acting through its duly constituted body.

The Board is set up to deal with a subject-matter usually of a technical or semi-technical nature with which its personnel are peculiarly competent to deal. It acts usually in conscious furtherance of some legislative scheme with the spirit and tenor of which it is particularly well acquainted. A court of law on the other hand, in arriving at a decision on the particular subject-matter, will by training and instinct, and the intrinsic nature of its customary functions, apply objective considerations based on legal refinements and precedent, a process obviously at variance with legislative intent, otherwise it would have been obvious that the courts would have been charged with administering the subject-matter in question. If a Board is authorized to make an order, by statute, "on such grounds as it deems expedient", how can a court state that the Board did not "consider expedient" an order that it had expressly made? The anomaly is too obvious.

Where a statute gives an unfettered and complete discretion to a tribunal, it is obviously under no obligation to grant applications made thereunder, even though the applicant's qualifications have satisfied statutory requirements. An applicant for a liquor licence under the Ontario Act cannot come before the Liquor Licence Board, and say, "I am an upright citizen, over 2I, pay my taxes, have never been convicted of an indictable offence, have held a licence before and never had a complaint registered against me or my establishment, etc." and then, claiming to have satisfied all requirements statutory, moral, equitable, etc, demand

a licence as of right. The applicant, in effect, is requesting the Board ,on considerations of policy and expediency, to exercise its discretion in his favour, and grant him the privilege of a liquor licence.

From the following innocuous-looking provision of the Manitoba Companies Act, the Court of Appeal of that province were able recently, to read an absolute discretion on the part of the Registrar of Companies. S.I29(3) of the Act reads "No co-operative corporation shall be created under this part without the approval of the Registrar nor shall any by-laws be filed ...until he approves thereof." The applicants having satisfied all the statutory qualifications, were refused incorporation by the registrar under the foregoing provision on the apparent grounds that none of the applicants was a farmer, and the projected business was intended to serve farmers. The Court said the Registrar could refuse incorporation on any grounds or on no grounds.(I)

Under the UK Licencing Act justices could grant licences to "such persons as they....in the exercise of their discretion think fit and proper." How can the worthiest applicant, having fully satisfied statutory qualifications, demand an licence of the tribunal as a right?

If then, an administrative tribunal has absolute discretion to refuse grants of various kinds, then the grant could not, in any case, be a subsisting or pre-existant right. When the tribunal acts then in making the requested grant, it, in a strong sense, "creates" a right, in the meaning that the grant is usually good as against the world at large, and the revocation usually lies with the granting tribunal and then, sometimes, only on stipulated statutory grounds.

Similarly, it is true to say that an administrative tribunal "imposes obligations". The Minister under the Ontario Public Works Act may, without consent of the owner, "enter upon, take and expropriate land he may deem necessary for

(a) the public purposes of Ontario, or

(b) the use or purposes of any Department of the

(I) Polzer v. Ward 1947 4 DLR 316. Discussed at length post under "Natural Justice"

Government thereof." (RSO c.323 s.I3)

The Ontario Milk Control Board may, by s.5 (h) of the Act by the same name, prohibit distributors compelling or inducing producers to invest money wither directly or indirectly in a dairy plant or equipment in order that such producers may obtain or retain a sale for their milk." They may under (e), "prohibit a processor or distributor from terminating the purchase of milk from a producer or a producer from terminating the sale of milk to a processor or distributor without just cause." Under (f), they may enter upon and inspect any land, place, etc. of any transporter, processor or distributor."

An expropriation order under the Public Works Act amounts to an imposition of an obligation of the strongest kind interfering with the age-old sanctions pertaining to the inviolability of a man's real property. An order under the above-qoted section of the Milk Control Act also imposes an obligation of a most stringent kind interfering in (h) and (e) with freedom of the subject to contract,an impregnable common law right, and under (f), with the traditional right of the subject to bring a trespass action even where a blade of grass on his realty has been pressed down by the heel of an interloper. These are two isolated examples of thousands that may be cited from the statutes both provincial and federal, which indicate the extent to which administrative tribunals do in fact "impose obligations" of a legal nature. There is no dergoation from this concept in the fact that the legislature in these cases looks to the common weal, the "greater good"of the community, at the expense of traditional common law rights.

From the two concepts so cursorily examined above, i.e. that administrative tribunals create rights and impose obligations, in doing so either ignoring or overriding non-statute law, it will immediately appreciated that the functions of these tribunals are primarily legislative in character. Indeed,it seems at last, that there is widespread recognition of this phenomenon both by courts and judicial writers. In fact, the general tardiness in apprehending this fact, is largely responsable in the writer's opinion , for the obscurity, and confusion so long attendant upon this entire subject.

Within the limits designated by Parliament or the provincial legislature, an administrative tribunal is a "miniature Parliament", carrying out delegated legislative powers, creating rights and imposing obligations. As Professor Willis points out in his article "Three Approaches to Administrative Law", (1936) I UTLJ, "English administrative law also affords many examples of bodies which act as Parliaments in miniature. The Minister of Health approving a clearance order under the Housing Act of 1930, the Board of Education approving the compulsory acquisition of land, a Milk Board fixing a regional price for milk under the Agricultural Marketing Act of 1931, all owe their existence to the principle that governmental work should be entrusted to those bodies which are most fitted to carry it out."

For some time, recognition that administrative tribunals really legislated was obscured by the widely-held belief that legislation must be of general application whereas the decisions of administrative tribunals were only applicable to specific cases. This proposition is easily rebutted, of course. Many admin. tribunals are authorized by statute to make orders and regulations of a permanent or semi-permanent kind which of course operate prospectively over a large general field. On the other hand, private acts of Parliament usually have a very specific application. The grant of a bank charter in Canada requires a private act of Parliament. However, there is nothing to prevent Parliament from passing an act setting up a Board with power to grant bank charters. Would then, the orders of the Board approving a bank charter be any less legislative in character than if they had , as previously, been made by special act of Parliament itself?

An example in point is afforded by the history of lighting authority in England. Until 1882, a company desiring to launch an electric supply project required a private act of Parliament. This requirement was modified by the Electric Lighting Act of 1882 which authorized the Board of Trade to arrange with the private entrepreneurs, the conditions of an order to be issued by the Board, subject to approval by Parliament by private act. The Act of 1919 provided that a mere Parliamenatry resolution

could confirm a particular, specific order granted by the Electric Commissioners. i.e. the Commissioners now in essence authorize an electricity utity, such authority having previously been reserved to Parliament itself.

In the U.S. all money claims against the U.S. were at one time the subject of private acts of Congress; most of this work has now been delegated to other agencies, "...insofar as rule-making goes, all this type of activity of Federal administrative agencies is work that congress could do it it had the time and deemed it wise to do it." (I) Similarly, the US Employees' Compensation Commission insofar as it paid benefits to Federal employees, was an administrative agency "doing what Congress formerly did by private acts."

Having now arrived at a number of conclusions as to the nature of administrative powers, we turn next to the function with which administrative powers are usually contrasted ie. the judicial.

3. Judicial Function

From a substantial number of decisions of the courts, a composit e definition has been devised, i.e. " apronouncement, finding, or order, binding upon the parties concerned and imposing a legal obligation or liability, or otherwise affecting property or legal rights of individuals." (..M^S Gordon 49 LQR).

Mr. Gordon asserts that this defintion is of value solely in distinguishing between acts that are judicial and acts that are "ministerial", a ministerial act being one performed in the execution of a decision made by a tribunal whether judicial or administrative, in relation to the rights and liabilities of the subject. A judicial tribunal condemns a house, and then issues a ministerial mandate, i.e. a warrant to the officers charged with executing the orders of the tribunal, to pull the house down, i.e. a ministerial act. A ministerial order is characterized then by a

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(I) Read and MacDonald "Cases and Materials on Legislation".

complete absence of discretionary powers, and is executive or enforcing by nature. (1).

The early decisions, almost invariably differentiate between "judicial" and "ministerial". As "ministerial" functions preclude the exercise of discretion, the distinction came to be that discretion was permitted in bodies other than ministerial, and, as these bodies were invariably characterized as "judicial" the association of "discretion" and "judicial" took wide root. When the phenomenon of administrative boards came on the scene, the traditional distinction appears to have been applied, administrative being assimilated with ministerial. As we have seen in examining the nature of administrative tribunals, their very essence was the breadth of their discretion, so that the failure of the courts to identify correctly the nature of the new bodies was bound to have the most unfortunate results. It is significant that, even very recently, we have seen a Quebec Superior Court characterizing as judicial the function of a certain tribunal on the ground that it exercised "discretion". (2)

It was clear, then, to Mr. Gordon, that the composite definition prefacing this section was wrong insofar as it distinguished only between ministerial and judicial.

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(1) In R. v. Simpson (1880) 20 NBR 472, it was held that the issue of a warrant by a municipal authority giving power to sell the realty of an assessee under the NB Tax Act of 1877, the person not being resident, where the assessment is made after an exerution where the person resided had been returned unsatisfied, is not a judicial but a ministerial act only. The test to be applied, said the court, was whether the judge was entitled to withhold his assent or not.

The Canadian Temperance Act of 1886 authorized fines for certain statutory breaches. An order in council of Nov. 15 1886 proveded that all fines and penalties recovered under the Act of 1886 were to be paid to the municipal treasurer; the Provincial Liquor Licence Act of 1895 provided for the appointment of liquor inspectors. A municipal council directed that, should any person other than the inspector, institute proceedings against any person other than for a violation of the Canada Temperance Act, on payment of any penalty recovered with costs of prosecution, the costs plus half the fine should be paid to the successful prosecutory. Held; this was not a judicial proceeding as it lacked all the essential elements of a judicial determination of a question or right of parties; it was a ministerial or legislative exercise of authority. It is an interesting question to determine which function was the most apposite to the case; if the view is taken that the legislature placed a duty on the municipal council to set up some procedure to dispose of fines, it might be termed ministerial to that extent, but, determining the question would make the primary function legislative or administrative. Note the assimilation o ministerial to legislative function by the court!

~~(2) cited post, under "Natural Justive"~~.

However, the definition, insofar as it purports to distinguish between judicial and administrative functions, is clearly wrong, according to Mr. Gordon, as the function inherent in "imposing an obligation or liability" or giving an order "affecting rights" is definitely administrative and not judicial. Insofar as the definition can be read to mean "creating rights or liabilities", there is no doubt that the definition is completely innacurate. There is, of course, room for argument that the decisions from which the definition was compounded, did not intend the "imposition" of liabilities to mean the "creation" of liabilities, and, a fortiori, that they did not import a denotation of "create" in respect to the "affecting" legal rights. The writer himself in the preceding section dealing with "administrative tribunals" used the word "impose" as synonymous with "create," but as I have just stated, there is considerable argument against such a construction, and against such a loose use of the word. Let us examine the alternate meaning, and see if we can ascertain whether the courts intended such a limited usage of "impose", and, a fortiori, whether they intended that a decision " affecting" legal rights should be read as a decision "creating" them.

Rights or obligations, in legal theory, are , of course, in esse, and a court merely ascertains and declares such rights or obligations in a judicial finding or pronouncement. A person has a legal obligation in esse to restrain things growing on his property from spreading beyond the confines of his premises. Although this is a pre-existent obligation, it is not imposed on him until his irate neighbour has obtained a judicial declaration of this fact, backed up by the threat of placing the executive machinery of the court in motion. That the obligation or liability must be pre-existent or in esse anterior to the pronouncement of the court is incontestable. A court could not prohibit " a processor or distributor from terminating the purchase of milk from a producer, etc." in dergoation of that person's freedom to contract, or "enter upon and inspect land of any processor, etc." in derogation of his right to bring a trespass action. These obligations are expressly "created" by an administrative tribunal acting under statutory authority. The use of the word "imposing", then could be the bringing home, the declaring, + enforcing, of a pre-existing right then, and not the creation thereof.

Similarly, Gordon imports into that part of the definition

"affecting legal rights", the curial denotation of "creating" rights. Prima facie, though, "affecting" legal rights, means "relating to" or "concerning" legal rights. The tribunal would consider the problem involving property or legal rights, ascertain them from precedent of case, and make a finding or order declaring or applying themi.e."a finding, pronouncement,or order" "affecting", "concerning",or"relating to" legal rights or property.

Mr. Gordon cites three cases intended to show the fallacy of the definition, based upon his reading that the "creation" of rights and liabilities are involved therein.

In R.Local Government Board 1902 2 IR 349, the Board revised the salaries of public officers. Here, their change of occupation had already changed their rights by statute. The court was therefore not creating a right or liability, yet this case has been cited for the proposition that courts impose liabilities, and affect legal rights, as contained in our omnibus definition. Two similar type cases cited as authority are also attacked by Mr,Gordon. In Everett v. Griffiths 1921 I AC 631, the detention of a lunatic was ordered. The order was made pursuant to statute, the Lunacy Act, and his mental condition which satisfied the statutory requirements. The court did not impose an obligation. In R.v. Dublin 1878 IR 371, corporation funds were raised by a rate; the rate was jutified by the obligation of citiszens to provide necessary corporation funds and the rates were fixed according to the legal responsibility of each individual. In none of these cases was a right taken away nor a liability imposed (in the sense of "created" of course),and so Mr. Gordon discredits the definition.

In any event, it will be agreed that the definition has no utility as a basis for distinction between judicial and administrative functions. If it means that rights and liabilities are created by judicial bodies,it is clearly wrong, as we have seen that courts,at least in theory merely ascertain and declare pre-existing rights and liabilities. If it means that liabilities are imposed,in the sense of declared and enforced,it is correct to that extent; but insofar as it means that a judicial pronouncement "concerns" or "relates to" legal rights and property, it is value-

less as every pronouncement of any body judicial, administrative, or even ministerial, <u>affects</u> legal rights and property, administrative a fortiori, in that it <u>creates</u> them .

The following is the definition of judicial powers adopted by the Committee of Ministers' Powers; (1)

"A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisistes;

I. The presentation (not necessarily oral), of their case by the parites in the dispute;

2. If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidnce;

3. If the dispute between them is a question of law, the submission of legal argument by the parties;

4. A decision, which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts sofound, including where required, a ruling upon any disputed question of law."

Substantively, then, the requirements are, I. an existing dispute, and 2. the application of the "law of the land" to the facts so found. The remainder, and, in fact, the bulk of the definition is concerned with matters of procedure. The nature of a function can hardly be said to depend upon the attendant procedure, and the definition to that extent, is based on a purely "formal" distinction, logically unsound and practically unworkable. Of the substative requirements, we will deal at length with 2, "the application of the law of the land", under the heading "Discretion" post. In the meantime, we will concern ourselves in the following section with "an existing dispute between parties," the major premise of the foregoing.

~~4. The Judicial Function -~~ (a) Lis Inter Partes

Firstly, the proposition that a dispute must be an "existing" one, within the terms of the foregoing definition, reqires examination.

Courts are charged with a considerable number of duties which do not involve an actual dispute at the time, but which <u>have been given to the courts because of the fact that they are</u>

(1) Command Paper 4060 1932, HM Stationery Office.

potentially litigous.e.g. the appointment of further trustees, administering trust funds, the appointment of guardians. There appears to be no good reason for limiting the definition to existing disputes, as the courts' decisions in these matters are activated by the same considerations and follow the same principles as if the matter with which it is seized were actually a contested one. The Committee's definition would perhaps read more reallistically if it read a "dispute or potential dispute."

Some judicial writers maintain that the existence of a dispute real or apprehended, is not a valid criterion for the ascertainment of functions. Dr. Jennings, for example, states, "in most cases, if not all, there is a potential dispute; but this is equally true of those functions of administrative authorities which affect the interests of private persons or other public authorities."

It is submitted with great deference that administrative tribunals do not, in fact, adjudicate upon disputes at all, and that the existence of a dispute real or apprehended, is a valid ground for distinction. The lis inter partes or dispute between parties, however, must be given a strict meaning for the distinction to possess any validity.

Lord Herschell 's judment in in the House of Lords in the Shell Co. of Australia v. Federal Commissioners of Taxation 1931 AC 295 gives the highest legal sanction to our view, and ably expounds the principle involved. He held that licencing justices are not acting judicially because there is no lis inter partes before them." The justices have an unfettered discretion as to whether or not the licence ought to be granted, and any number of the public may object on public grounds aside from personal considerations. The applicant seeks a privilege, and the citizen who objects merely informs the mind of the court to enable it rightly to exercise its discretion whether to grant the licence or not. If the judge decides not to grant the licence it is on grounds that such a licence would not be for the public

benefit. It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determiniation in his favour."

If then, the other disputant ~~cannot be a~~ is a private objector, who merely "informs the mind of the court", who is the other "partes" to the dispute? It has been maintained that the other partes or disputant is the public. Dr. Jennings states, at p. 7I, "To say that the only person capable of being a party to a controversy is a private person or a corporation seeking to enforce indevidual rights is to advocate a conception more fitted to the I9th. Century than the 20th. We must now regard the public as very definitely a party to certain kinds of proceedings, which are decided judicially."

Does Professor Jennings mean that the public should be represented in certain issues in courts of law, because, of course, the public <u>is</u> presently represented in certain types of cases by specialists who are public officers, e.g. the King's Proctor (now the A/G in Ont.), in divorce proceedings; the Official Guardian in infancy applications; the Public Trustee in mental incompetency proceedings, etc. Or, is the general public as represented by a certain political unit, e.g. municipality, province, etc. to argue public policy before the court (decisions based on public policy must always reflect the philosophy of the judge, and, are, in any event notorious for their precariousness and inconsistency). Again, a great number of cases in which the "public" would be interested concern disputes involving conflicting class concepts. Who is the public's counsel to represent, local ratepayers of high rates or indigents, clergymen or night-club operators ~~(say, in Las Vegas)~~?

If he means that the "public" should be represented in "judicial-type" hearings before administrative boards, his position is even more anamolous. Administrative boards <u>are</u> the public (see Tynemouth v A/G I899 AC 293.), and the public in the only real sense of the term. i.e. delegates of Parliament. Does he contend that the applicant and the "public" should be "parties" before a tribunal which is the public? Remember, Dr. Jennings refers to a tribunal acting judicially, and to be judge in one's own cause is a violation of the first rule of equity and public

morality."

A dispute between parties involves a conflict of opposing "rights". But administrative tribunals do not give effect to "rights", as we have seen, but grants privileges or "imposes" obligations or liabilities, on considerations of public expediency. True disputes, or conflicts between opposed existing "rights" imply the ascertainmnet of those rights by analogy from precedent against the objective criterion of the law. Before an administrative tribunal then, there is no lis, and, as we have seen, no partes. Before a court there is a dispute or potential dispute. This, then, we take to be the first distinction between the judicial and administrative function. (I)

5. The Judicial Function (2) Discretion

Dr. Robson is extremely critical of the Committee's "almost naive" propensity to envisage the "law of the land" as a complete perfect structure ready to be applied to any controversy immediately it arises. When did the Chancery discretion become truly judicial? Did not the House of Lords do precisely what it "thought best" to do in the Taff Vale Case, or in the "snail in the bottle" case? "Have not the common law and equity been developped to an enormous extent by the judges doing what they 'thought best' ?" He continues, "It is obvious that the degree of discretion available to adjudicating bodies varies greatly between different classes of cases and different bodies; in some cases the House of Lords has almost complete latutude to do whatever it wishes, subject only to the need for maintaining the corpus of the law coherent and consistent; the same is true of all courts, whether civil or criminal, and also of administrative tribunals. The notion that a government tribunal is free to follow any whim of the moment under the guise of calling it 'policy' is too ridiculous an assumption to call for serious consideration."

(I) It is enlightening to note that Article III of the US Constitution limits the jurisdiction of American courts to "cases and controversies". Read and MacDonald, "Cases and Materials on Legislation", aptly define cases and controversies as "matters in which a court can determine with finality the rights of adverse parties by applying the law as found." The American Supreme Court, strictly applying Art. III, have held that Federal courts cannot be authorized to fix prices or perform functions calling for the exercise of wide discretion.

Mr. Jennings adopted the same approach, (Appl.I. of the Law and the Constitution), "In most cases, (before the courts,) the problem is one of discretion. In nearly all creiminal cases, the most difficult part of the jurisdicion is to determine what punishment, if any, is to be inflicted....There is frequently a discretion in civil cases as to the remedy to be given or the amount of damages when it is decided that damages is the remedy. The existence of discretion in the divorce cousts is so well known that there are even principles of policy as to the way in which it should be exercised. The prerogative writs, injunctions, specific performance, and other equitable remedies are termed 'discretionary' ".

Serious objection must be taken to the view presented above that "discretion" is some kind of homogeneous entity,unqualified in nature and application, subject only to the degree in which it is encountered in various tribunals,whether they be courts of justice or administrative tribunals. Mr. Robson himself has disclosed the crux of the distinction that should properly be drawn between judicial discretion and administrative discretion, when he states that the House of Lords may exercise its discretion whatever way it wishes "subject only to the need for maintaining the corpus of the law coherent and consistent." Surely, such a restriction on the exercise of discretion is not an element that can be passed off as a mere bagatelle! A body exercising judicial power exercises a discretion imposed by the inherent necessity of adhering to precedent; if the court wishes to depart from precedent, it must take the conscious responsibility of distinguishing the circumstances with which it is seized from contentions of the parties before it that identical or substantially similar circumstances were adjudicated upon previously by a competent tribunal in a certain way ,correctly reflecting settled principles on the point in issue. That responsibility is a grave one, and one that in all but the highest court of the land, is subject to review and the closest judicial scrutiny. In the highest courts, the responsibility of overruling precedent is a grave one also, and one that is approached with the greatest trepidity in view of the authority that has long been accorded the overruled decision ,with the most serious effect on civil rights and standards of conduct that have been designed to conform thereto. Even then, it is an almost inviolable rule that the House of Lords never overrules itself. The case-books are full

of decisions which are hard cases, where the court, on every consideration, disliked applying precedent, but did so because of the principle of stare decisis. Had an administrative tribunal, with unfettered discretion, been seized with the same facts, is it not logical to assume that they would have handed down a decision on the "intrinsic merits" of the case, on the humanities involved, the abstract justice, etc.?

The compulsion of courts to be guided by precedent is admirably presented by Karl Llewellyn, "Impressions of the Cinncinati Conference on Judicial Precedent" in I4 U.of Cin.L.Rev. 343.

"(I) Common to all (of the views expressed at the Conference by the judges) are lines of compulsion in the precedents, which to a great extent limit, and which to a great extent control their action. And which, <u>to some extent, control them even when their judgement is that the case would better be decided the other way.</u>

(2) But when the urge of justice and policy are clear enough, they can find a distinction to avoid or whittle away almost any precedent or line of precedent.

(3) Within limits wide enough to spell success or disaster for a lawyer's case, the precedents are capable of being shaped as they are followed or applied so as to bring judgement out on one side or the other.

(4) But shaping is <u>not</u> arbitrary. And

(5) Such shaping or its non-occurrence is indeed largely predictable. And

(6) The judges who do the shaping, as they are doing it <u>feel</u> to a large degree <u>controlled</u>. They feel that the Rules as they Stand should allow and do allow only one proper answer."

There is, of course, no suggestion that stare decisis is a straight-jacket. That view has long been discretided . "There will be cases where a change of ruling is desirable or necessary; and where legislative action to work the change will be impracticable. In such cases the courts should be free and feel free to make the change." And yet, how often has a court raised the plaintiff plea that it must follow precedent, and hope that the legislature will step in an effect a remedy?

Judge Black stated in Hole v Rittenhouse 2 Phila. 411, "The majority of this court changes on the average once every nine years without counting the chances of death or resignation. If each new set of judges shall consider themselves at liberty to overthrow the doctrines of its predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain, and vicious, that the world has ever seen. ...To avoid this great calamity I know of no resources save that of stare decisis...I would stand by the decisions of previous judges because they have passed into the law and become part of it...have been relied and acted upon...and rights have grown up under them which it is unjust and cruel to take away." An old adage is ,"hard cases make poor law."

Mr. Justice Roberts said in Higgins v Smith 308 US 473. "I am of the opinion that the courts should not disappoint the well-founded expectation of citizens that, until Congress speaks to the contrary, they may, with confidence, rely upon the uniform judicial interpretation of a statute."

With fast-changing relationships, and the ever increasing complexity of modern life generally, there is no doubt an increase in what is frequently called "judicial law-making". It may be argued in most cases that "changes" in the law should be left to the legislature, and that the most logically persuasive precedent should always be adhered to; but of course, it is not always as simple as that. The development of various branches of law, e.g. property and contract are traditionally reserved to the courts, and changing concepts of expediency must and do impel courts to "legislate" in substance upon occasion. This is particularly true when they overrule precedent of long-standing, or refuse to follow compelling and persuasive precedent.

If it si true that courts on occasion make law consonant with policy or expediency, it is only in the restricted sense set out above and it is unequivocally submitted that the general governing "policy", the alternative to which is anarchy, is that of maintaining consistency and coherency in the law, in applying directly or analogising as closely as possible to, that preceding decision founded on the same or substantially the same set of circumstances as that with which

which the court is presently seized. The discretion is <u>judicial</u>;(I) an administrative tribunal seized with the same facts would have no compunction in ignoring precedent completely, no matter how cogent ; its discretion rests solely on considerations of policy and expediency. If a court of law has at one time granted a mandamus or certiorari on a stipulated set of facts, a solicitor, in advising his client, would feel justified in informing him that the court would grant a similar remedy to him on substantially the same facts. The judge has discretion in the application of the remedy ,but the discretion is exercise on firly well-established grounds. Because an administrative tribunal has granted a liquor licence to an applicant on the basis of a certain set of facts and representations one day is no guarantee that the same tribunal will grant a licence to another applicant on essentially the same facts and submissions on the day following. Because a Labour Relations Board certifies a union as a bargaining agent on a certain set of representations one day does not mean that it must or will grant a certificate tomorrow to another applicant on the identical or substantially the same representations. It can turn down a licence, a franchise, a certificate for no reason or any reason. It needs state no reason . A court of law must give reasons for its decisions.

A judge cannot decide a case merely on the grounds that the decision is socially or even morally desirable or advantageous. An administrative tribunal can.

(I)The famous case of Rylands v. Fletcher illustrates the point. The defendants contructed a reservoir upon their land, and upon the site chosen for the purpose, there was a disused a filled-up shaft of an abandoned coal mine, the passages of which connected with the adjoining mine of the plaintiff. Through the negligence of the independent contractors by whom the work was done, this fact was discovered, and no precautions were taken. Eventually, the reservoir flooded the plaintiff's mine. There was no negligence on the part of the deft.'s, nor was it nuisance, as then understood, since the damages were no continuous or recurrent, there was no trespass since the flooding was not direct or immediate. Recovery was allowed on the analogy of strict liability for cattle trespass. Here, if ever, a court was "legislating" but Prof. Prosser,states," it seems clear that the court considered that it was not introducing anything new into the law. Strict liability was a familiar thing, not only in animal cases,but as to invasion of land.If the water had broken into plt.'s land immediatley upon being poured into the reservoir, there would have been a CL trespass; if it had seeped through slowly, it would have been a nuisnace.. "The "legislative" character of the decision consisted in analogizing the facts in issue with those where liability lay. If there had been no such thing as cattle trespass could the court have allowed recovery? I think not. The discretion was still judicial; the court had to find a judicial "peg".

Per Harrison J in Wiston v Woolen 1876 40 UCQB 246 (CA). " It is not for a subordinate court to disregard the decisions of a Court of Appeal; but on the contrary, it is the duty of the subordinate court to give full effect to such decisions, whatever its views may be as to their intrinsic wisdom..."

Per Meredith CJO, in Clarke v. Huron County Flax Mills 1922 OLR 460 " .....the correctness of this decision has never been questioned in any decided case; and, according to the well-established rule in the stare decisis practice, such a decision ought not to be departed from now, even though one were of the opinion that it is wrong."

Per Middleton JA in Sweeney v Department of Highways 1933 OWN 757, ' Counsel for the applicant admitted that this case was on all fours with the decision in Sweeney v Dept. of Highways 41 On 136, but contended that that decision was erroneous and asked to have it reviewed "The guiding principle in this case is thus well put by Scrutton LJ in Hill v Aldershot Corpn. 1933 I KB 259 ' If I had a free hand to construe the statutes without reference to the decisions, I would probably have arrived at a different conclusion from that which I have!....... Such a decision would no doubt be welcomed by non-judicial writers who have protested against that too-careful adherence to the principle known as stare decisis, to the decisions of superior and coordinate courts though we do not agree with them. But , in my view, liberty to decide each case as you think right, without any regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what judge his case would come and could guess what view that judge would take on a consideration of the matter, witho any regard to previous decisions."

Per Burton J, "Where a solemn determination which established a rule of property, has been acquiesced in for a long period, a court, even of last resort, should require very strong grounds for interferenc with it; still less should it do so when it finds that such a decision has been acquiesced in by the legislature." (Whitby v. Liscombe 1876 Gr.

Caldwell v McLaren 1884 9 App C 392. 'The maxim 'communis error facit jus' is peculiarly applicable to conveyancing questions. Th doctrine has often been recognized that in questions of conveyancing it is important to adhere to decided cases even if convinced that

they were originally wrong."

Re Guthrie 1924 56 OR 189, "The construction, interpretation, and effect given to s.33 of the Wills Act 1837.....has become by judicial decision ingrained in Ontario Law and it is too late for any court to reopen the question so long settled and upon which so many titles depend."

From 1895 to 1931 the Ontario Judicature Act required courts to follow precedent. Although this provision was repealed in 1931, the principle is applied with the same rigidity as when it was required by statute, on the basis of "judicial comity", " comity among judges", a basis so fundamental that every court realizes that failure to adhere thereto spells anarchy for the rights and liabilities of the subject, and for the whole system of jurisprudence of common law jurisdictions.

Is it possible to assimilate the " discretion" examined above with the discretion of administrative tribunals acting under statutory provisions that a Board may do so and so "where the Board is of the opinion", or "which the Board may deem equitable", or " as the Board deems most reasonable and most in accord with the principles of this act," or " in a manner that the Board deems satisfactory", or "where the Board considers expedient " ?

We recall that Dr. Jennings stated that in most cases before the courts, the problem was one of discretion, and proceeded to cite the instances of damages, divorce, the prerogative writs, injunctions, etc. (see quote at top of p.47).

The discretion involved in these cases, though often substantial, is an entirely different kind of discretion from that that Dr. Jennings would have us believe, as throughout he is attempting to assimilate the kind of discretion exercised by judicial bodies with that exercised in administrative proceedings.

Under the heading "damages", the Canadian Abridgement cites over two hundred pages of cases which have been reported and which express the principles to which the courts should adhere in determining damages. In theory, in any event, and to a large extent in practice, the discretion of courts in considering damages is confined and restricted by these cases, let alone by the highly persuasive law on the point originating in other than Canadian jurisdictions.

Rules are well-established regarding, for example the distinction between penalties and undertakings for liquidated damages, for the necessity and extent to which an injured party must take steps to mitigate his loss, as to the occasions where certain classes of damages should be awarded, e.g. exemplary, nominal, punitive, substantial: the requirements respecting alternative relief: releases or bars of claim; in respect to continuing damage, prospective damage, time of ascertainmnet, natural consequences, foreseeability, "damnum absque injuria", joint tortfeasors, breach of statutory duty. In contract there has grown up a long line of persuasive precedent based on the rule in Hadley v. Baxendale. In tort, of course, there is necessarily a large subjective element present, and laws of remote and proximate damage, and the mental element frequently present, renders tort damages peculiarly susceptible to judicial legerdemain. This disability is inherent in the very nature of tort damages, and not in any sense, indicative of arbitray action on the part of the courts. From time to time at least, the principles of leading cases have provided criteria, however imperfect, to guide the courts' discretion. Thus the Re Polemis decision gave the highest authority to the extent to which foreseeability was a necessary condition precedent to recovery.

What discretion may a judge validly exercise in granting an injunction? Snell, "On Equity", p.572 states, "Where...an injunction is sought to restrain the breach of a negative contract, the court has no discretion to exercise." Again, "the jurisdiction to grant an injunction is exercised according to settled legal principles." The House of Lords has laid down rules relating to the exercise of such discretion as the court has to grant an injunction in lieu of damages, i.e. whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, and, if capable of being atoned for by damages, whether those damages must be sought in successive suits or could be obtained once for all. If the plaintiff establishes his legal right and the actual or the threatened violation of it, <u>he is entilted to an injunction as of course...</u>

These well-established rules restricting the use of the injunction prevail despite the statutory carte blanche (Judicature

Act ,1925,s.45) which states,"the High Court may grant an injunction...in all cases in which it appears to the court to be just or convenient so to o." Even when a court has statutory authority to procee at its a solute iscretion that iscretion is still exercised ju icially! If such authority ha been vested in a ministrative tribunals, what woul their view have een in practive, comparatively with its exercise by judicial bo ies? If a person appeare before an administrative board charge with such statutory power, requesting an injunction to restrain his neighbour from using the same name for his house as the applicant, that worthy bo y, an quite properly, woul apply policy an expediency, which woul , no doubt ictate the issue of the reme y, on groun s of eneral social undesirability. A court of law woul e impelle to refuse the reme y, on esta lishe legal groun s which preclu e an exclusive right to the use of a particular name for a private resi ence. The court must use judicial iscretion .(ay v. rownrigg 1878 10Ch. 294).Although this case was eci e in 1878, an the Ju icatur ct provision was enacted in 1925, it was he that the section i not give the court power to issue an injunction her formerly the court coul have given the applicant no relief at all...another judicial concept limiting the use of the r me y.

The sa e reasoning applies to the application of the "iscretionary" reme y of specific performance.

A court's discretion is likewise limite y well-established rules in the question of granti g a ivorce. The most ambiguous an in eterminate element before a ivorce court is usually evi ence of a ultery, an , although the questi n of a mis a ility cannot e com resse into har -an -fast rules, well- efine limits have grown up governing proof of none-access, a missability of hotel registers, a missions in letters,etc. A Ju ge,by statute, has no iscretion as to whether he may grant a decree where there is evi ence of collusion, condonation, or connivance. The court's so-calle iscretion is best known in respect to the "iscretionary bars" of a ultery of the petitioner an conduct of the husban conducing to the wife's adultery, laches, etc. The statement of the court in Samail v Samail 1922 2 WWRis representative of the law on this qestion"...while the court has a discretion to grant or refuse

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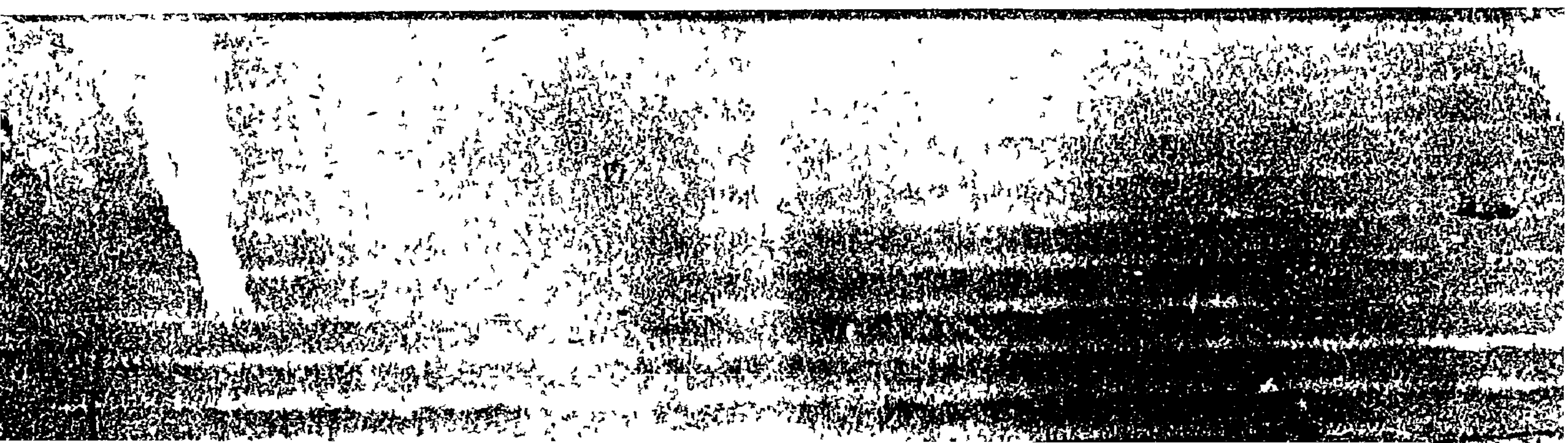

the decree, it has very rarely granted a decree to a guilty petitioner, and there were no exceptional circumstances in this case to warrant its doing so." The court considers that it is bound by a more or less firm rule, and quoted precedent, e.g. Barnes v Barnes LR I P 572, Dyke v Dyke 1904 P 149, Evans v Evans 1906 P 125, in which courts had refused decrees under similar circumstances. This is discretion, but it is "judicial discretion"! Is this the "complete, unfettered plenary" discretion of the administrative tribunals.

Dr. Jennings says " The existence of discretion in the divorce courts is so well known that there are even principles of policy as to the way it should be exercised." But, what is "policy " in a court of law, but law itself, to be applied according to the principle of stare decisis? Could the judge in the court above have said in giving judgment, " I know that Barnes v Barnes, Dyke v Dyke, etc., laid down that a decree should not issue where the petitioner has committed adultery, but, in view of my idea of policy and expediency in this case, I am overlooking what they have said, which is only "policy" pronounced by courts of superior or concurrent jurisdiction?"

Surely, the above court could have distinguished the cited authority, but then it would have been under the strongest compulsion to state categorically that the circumstances of the case before the court were such as to constitute in fact, "exceptional circumstances" so as to take the case out of the rule. This compulsion is of the essence of the whole principle of stare decisis.

This compulsion or persuasion of precedent is present even when a court debates the question as to whether it will or will not issue a prerogative writ, although Dr. Jennings quotes these instances of evidence of courts of law exercising his "homogeneous" discretion, applicable to all bodies. Although in practice the use of the prerogative writs is uncertain and even precarious, that does not mean that the courts' discretion is unlimited or unfettered. It has long been an acknowledged rule that the writs lie only where the function of the tribunal to whom they are directed is judicial (or more recently, "quasi-judicial"). The courts at least purport to follow the Rice Case, the Arlidge Case, or the Shell Case, even though the use of the writs are often arbitrary in practice. As a matter of fact, there is increasing evidence of judicial restraint in the issue of the writs in some jurisdictions, in the cur

disinclination to extend the remedy beyond the bounds imposed by increased recognition of sound judicial principles, regardless of the Courts' inherent desire to curb "administrative lawlessness" There is a world of difference in a court's following policy and in an administrative tribunal's following policy. A court does not consciously adopt "policy". The court's policy is derived from a feeling judicially toward previously enunciated principles, by analogy, by conscious derivation, in all of which is present the determining compulsion to maintain the "law" on the subject intact and coherent in principle. An administrative body, being under no such compulsion, may formulate "policy" from one case to the next. It may at any time consciously depart from "policy" or blatantly ignore a line previously adopted. It need have no policy at all, in most cases, is under no necessity to maintain coherence of [illegible] in its decisions, need seldom [illegible] higher tribunals, need not usually even give reasons for decision. Even if an administrative tribunal consciously [illegible] or attempts to implement concrete [illegible], and if it does, is under no inherent compulsion to do so. It may, within the bounds of its statutory grant of authority, rule capriciously or arbitrarily, although they do not do so of course, in practice.

Even if the examples cited by Dr. Jennings did constitute the wide exercise of discretion by courts that he would have us believe, so few examples would not be generally derogatory of our proposition that the two discretions are inherently different. It is a well known fact that courts, in addition to their customary judicial functions, are entrusted with functions that are essentially administrative in nature, e.g. the issue of warrants, the granting of bail, orders for restitution, etc. These examples were cited by Dr. Jennings himself. There are many others, e.g. contempt, costs, The fact that a body is charged with functions of a different nature than those under discussion, does not derogate from the practicallity of differentiating from its principle function, and the function edercised by another type of tribunal. A court of law, which normally exercises judicial functions, may "wear two hats" as it were, and yet the nature of the judicial function may as readily be examined. He is himself aware of this, in that he prefaces his analysis, rebutting of which we have undertaken ...

(See other file)

we are not concerned with the judicial class of functions in itself but with the functions actually exercised by British courts but, of course, the arguments have been used by him to show that there is a separate class of judicial functions, whether or not they are exercised by courts." He thereupon sets out the arguments just discussed as supporting his thesis that no differentiation may be made between the two functions on the basis of discretion, as discretion is common to both,. With that argument we have been concerned at some length.

While we have been preoccupied with the judicial discretion as being exercised in accordance with precedent, there should be no objection to the extension of the concept to embrace the necessary impulsion to adhere to any binding objective standard. Statutes sometimes prescribe "objective standards" with reference to which bodies must exercise discretion. If a statute empowers a licensing body to grant licences, after the tribunal has satisfied itself "that the applicant has satisfied the qualifications prescribed herein, and is otherwise a fit and proper person," the statute has thereby imposed an objective standard with reference to which the tribunal must exercise its discretion in granting or withholding a licence. In other words, it would certainly appear to preclude the withholding of a licence on grounds that there were already too many licence-holders in the area in question. Insofar as there is an objective standard according to which the court reviewing might ascertain whether discretion had been properly exercised, it might be said that the tribunal was acting judicially. To what extent this "objective standard" must be present before a finding might validly be made that the tribunal is acting judicially, is, of course, a continuing problem.

On the basis of the above arguments the writer has little hesitation in holding the following as a valid differentiation between the respective functions. "A tribunal acting judicially exercises discretion, if any, by the application of analogy to a specific objective standard; an administrative tribunal exercises discretion on the basis of policy and expediency."

(a)

~~6. The Judicial Function Continued~~..Other Attributes

Mr. .M. Gordon has stated that certain attributes of a judicial tribunal have gradually become fixed. These attributes are, he postulates:

I. They deal with or are concerned with legal rights and liabilities.

2. Legal rights and liabilities are not created by the tribunal. They are pre-existent and are ascertained by established judicial process from the law as contained in statute and case precedent, either directly or by varying degrees of analogy. Having been ascertained, the rights or obligations are asserted in a finding or pronouncement, order, or judgement.

3. The tribunal is bound by certain rules and restrictions, based largely upon "natural justice", and principally directed to the necessity for notice, for giving the parties a chance to be heard to call witnesses and adduce evidence, and presumably to permit cross-examination. (See "Curial Machinery" post, under "Certiorari")

4. It cannot refuse to hear a case involving legal rights or liabilities, and must render a decision.

Attribute I. we have found to be too broad as a basis for distinction, being common to both the judicial and administrative functions, and we have endeavoured to establish that the true judicial function involves a "dispute either present or potential". Attirubute 3. is rather putting the cart before the horse. Although the actual decisions in point are extremely perplexing, it certinly seems safe to state that the reviewing court must first ascertain whether the tribunal is a judicial body, and then, having found the body to be judicial, prescribe the formalities or procedural requirements, such as hearing, notice, etc. However, as we shall see, it is not completley free from doubt on the decisions, whether notice, hearing, etc., the attributes of natural justice, are not required in respect to all tribunals regardless of the primary nature of the function performed. If the latter view were taken, i.e. if natural justice must be observed by all tribunals, then, a fortiori, Attribute 3 has no significance as a basis for distinction.

Professor Robson, at p.I5, proposes the following characteristics of pure judicial functions;

I. The power to hear and determine a controversy,

2. The power to make a binding decision (sometimes subject to appeal), which may affect the person or property or other rights of the parties involved in the dispute.

The second power is applicable to both judicial and administrative bodies. We note, further, the conspicuous absence of the intrinsic process by which the dispute is "heard and determined", the absolute sine qua non of the judicial function, the application of the "law" directly or by analogy, or the hearing and determination by reference to the objective standard of which we have spoken at length. We have discussed Prof. Robson's views leading to this vital omission, in the preceding section, and submit that his definition as a result of the omission, is practically valueless.

Courts have frequently, in practice, had recourse to other factors than those already discussed, to serve as the basis for assessment of the function.

One criterion that has sometimes been seized upon to the exclusion of all relevant factors, had been, the question as to whether Parliament has provided for a right of appeal from the decisions of the tribunal to a court of law. It is presumed that if Parliament intended the application of judicial principles on appeal, it also intended it in the first instance. There is dicta to the contrary, however, in the Arlidge Case.

One test of some antiquity has been that if the tribunal is required to act like a trial court in some material particulars,e.g. procedural aspects such as the necessity for taking evidence on oath, then it is a judicial body.(R.v.London County Council). The inference here is that if these procedural attributes are not required, the tribunal cannot be a judicial body. In other words, a tribunal may be empowered to hear and determine disputes between parties according to the dictates of some objective standard, amd must give a decision binding upon the parties, and yet be ruled a non-judicial tribunal because of the absence of authority requiring them to hear evidence on oath. That proposition would obviously be untenable. The position is stated in the Shell Case. " There are tribunals with many of the trappings of courts which are not courts in the strict sense of exercising judicial power !

The answer, must, of course, be found in the essential nature of the function of the tribunal.

Further it is not always possible to infer the nature of a specific order from an assessment of the general functions of the tribunal. A tribunal may be empowered to deal with certain subject-matters judicially and others administratively e.g. when justices who normally exercise judicial functions, in the strictest sense of the word, are authorized to act as licencing tribunals where, as we have seen , their decisions as to whether to grant a licence or not are exercisable 'where they deem it expedient' i.e. administratively. The actual issue of a licencing order is often dual in nature, being judicial insofar as the applicant's qualifications are ascertained against the 'objective standard' of the statute, and administratively, insofar as the decision as to whether to grant the licence is determined on the basis of policy and expediency.

In Ontario a test that has been applied recently is "was the proceeding under review primarily by way of investigation only?" (St.John v. Fraser, Re York Township By-law, Imperial Tobacco v. McGregor, etc.) The test has been applied to a referee acting under the Municipal Act, the Combines Commissioner, statutory commissions investigating stock frauds, etc. It is submitted by the writer that this so-called test is merely a necessary corollary or refinement of the main test, 'does the tribunal in question give effect to legal rights or liabilities, or does it create them,' As an investigator at most can make recommendations which need not be acted upon or adopted, it cannot be said either to be giving effect to pre-existing rights (judicial), nor creating them (administrative). In any event , the criterion, is of course of very limited application, applying only to investigatory tribunals.

If the duty 'to investigate" may always safely be categorized as administrative, it has been held that the duty to "decide" is a necessary judicial attribute. We find the court in Re Ness and Inc. Can. Racing Assoc. 1946 OR 387, stating ' in order that certiorari may lie, the body whose acts are in question must have imposed on it the duty to decide, as, for example, the duty cast upon the magistrate, or other authority, to grant or withhold a licence in connection with a public house." It seems rather unfortunate that

the court should have cited by way of example, the case of licencing justices, whose functions have been widely acknowledged as administrative. However, it points up the inadequacy of the test, as there are innumerable instances of administrative tribunals being under similar obligation to arrive at a firm decision on the matter before them.

The degree of finality of the decision has sometimes been adopted as the conclusive factor determining the function of the tribunal. One of the chief attributes of judicial functions as exercised in a court of law, is the requirement that the decision shall effectively terminate the matter at bar. The court of first instance is usually taken to have adjudicated finally on issues of fact, while issues of law in many cases carry a right to appeal to a higher tribunal. Behind the power to decide is the machinery activating executive enforcement of the judicial decree. That "lex is rex would appear to be inherent in any judicial system is generally uncontested the actual ability to ignore judicial decrees would be the surest path to anarchy.

What about administrative finality? This question is, of course, the real subject of this paper, but it may be in order to state generally, that the final reply is usually a question of the reading of the governing statute. If the grant of statutory authority is "administrative" in the purest sense, if the discretion is subjective in essence, "if the board is of the opinion", "if the board deems it expedient, etc., the courts would then possess in fact, no licence to review the decision, as is erroneously said, "on the merits". As we shall see, however, where the grant is obviously administrative, the courts appear to be ready, in suitable cases, to intervene nevertheless, if they believe that canons of natural justice have been violated. To this extent, that judicial review always hovers in the background, it might be justifiable to qualify the finality of even pure administrative decisions, in practice but not, of course, in theory. As has previously been stated, it is logical that an administrative tribunal cannot rule finally on the nature or extent of its jurisdiction. "To vest the administrative finding here with finality would be to allow the administrative body itself to find the facts upon which the exercise of its power depends." (Bernard Schwartz).

In view of Liversedge v. Anderson however, there is increased authority for the proposition that purely 'executive' decisions are practically immune from curial interference. (~~See finality of executive decisions, post.~~).

4. Quasi-judicial

A phenomenon of recent growth and increasing importance is the emergence of the concept of "quasi-judicial", to which perfunctory reference has already been made. An examination of this most unscientific hybrid could justify the conclusion that the courts, increasingly aware in appreciation of the nature of 'true judicial" function, have consciously evolved a thinly-disguised excuse for continued intervention.

In the course of the proceedings of the Committee on Ministers' Powers, the Treasury solicitor gave the following definition of "quasi-judicial" (Cmd Minutes of Evidence v. p.I)." Quasi-judicial is the power of giving decisions on questions or differences of an administrative and non-justiciable character which cannot be determined by reference to any fixed rule or principle of law, but are a matter of administrative discretion and judgement...It may be called a quasi-judicial function because the department must approach the question to be settled with an impartial mind, must ascertain the point of view of each party, and must broadly speaking, hold the scales evenly between them."

These questions could not be decided on abstract principles and were non-justiciable (thereby letting out the courts; they were usually technical and represented departmental policy in practice, and therefore should be given to the department administering the legislation in question)

This thesis precludes the existence of a discretionary element in law, and the absence of law in discretion, according to Dr. Jennings who also appeared as a witness before the Committee. The above definition presupposes a dispute between parties, and involves the first two characteristics of the Committee's definition of "judicial" (see supra), i.e. the presentation of their case by the parties, and the ascertainment of the facts by evidence adduced by the parties. The definition does not nessecarily involve the third characteristic, i.e. if the dispute is a question of law, the

submission of legal arguments by the parties, it never involves the fourth, which is replaced by administrative action, the character of which is determined by the minister's free choice.

The Committee cites as a perfect example of a quasi-judicial decision, a dispute between medical officers of health which is referred to the Minister for a decision. Propositions I. and 2. of the definition must be applied, i.e. the Minister must give both "parties" an opportunity to present their case, and must ascertain the facts by evidence adduced by them. The Minister then arrives at a decision on grounds of policy and expediency.

Mr. Gordon takes the term "quasi-judicial" as applying to the decisions of those "administrative tribunals whose procedure resembles a court, 'quasi-judicial" being stated to mean 'not exactly judicial", and he continues by condemning the term as not only vague but misleading, in that it suggests that the resemblances between judicial and administrative tribunals when their procedure is similar, outweighs their differences: in other words, that the "incidental outweighs the essential".

Firstly, the writer believes that a survey of the cases indicates conclusively that a much wider definition must be adopted than that posed by the Committee on Ministers' Powers. The courts, by classifying a function as quasi-judicial, acknowledge that the function is not judicial, which would be their logical justification for interference, and concede that the function is actually administrative. By classifying the function as quasi-judicial they are merely saying that the particular subject-matter which is really administrative, so affects the rights and liabilities of the subject, interfering with the enjoyment of his property, etc, that the body is under a "duty to act judicially", or that the function is "quasi-judicial", or that it must act in a "judicial capacity. Consequently, the body must observe the rules of natural justice, i.e. it must give notice, a fair hearing, act impartially, perhaps allow cross-examination and production of documents.

As a result, issue must be taken with Mr. Gordon's contention that ther term implies that procedural similarities outweigh essential differences. The court does not look at the procedure of the tribunal, but, having examined the nature of the

subject-matter with which the tribunal is dealing, ascribes certain procedural requirements to the tribunal, having stated that it must act judicially, or is acting in a quasi-judicial capacity.

Dicey gave utterance to the principle in commenting upon the Rice and Arlidge Cases, in 31 LQR, " a government department, when it exercises judicial or quasi-judicial jurisdiction under a statute, is bound to act with judicial fairness and equity, but is not in any way bound to follow the rules of procedure which prevail in English courts."

The principle was authoritatively enunciated by Lord Loreburn in the Rice Case, "...what comes for determination...will, I suppose, usually be of an administrative kind...I need not add that they must act in full faith and fairly listen to both sides for that is the duty lying upon everyone who decides anything." We find the same language used by Atkins LJ in R. v. Electric Commissioners, "....wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of their legal authority...."

In the Errington Case in 1934, we find the English Court of Appeal stating that, as soon as a property-owner had raised objections to a clearance order, the Minister had ceased to be acting administratively and was thereafter acting "quasi-judicially". The functions of the Minister had not changed, but now, after the objection had been registered, he must exercise the same functions in a different way, i.e. quasi-judicially, and as, must accord a fair hearing, etc.

The tendency of a court, seized with a particularlu meritorious application, to ascribe to the tribunal the necessity of acting quasi-judicially, is well exemplified recently in Ontario in Re Brown and the Rentals Administrator. Here, the Court of Appeal classified the powers of the Rentals Administrator as purely administrative.. Three years later, the same court, faced with a hard case, (Cox v. Villeman), classified the functions as "quasi-judicial", stating, " the Court of Rentals Appeals, performing the same functions

as the Rentals Administrator at a higher level, while not an inferior court in the strict sense of the word, was one which was required to discharge quasi-judicial functions, and was therefore amenable to review.

In St. John v. Fraser, the Supreme Court of B.C. found that the Rentals Administrator set up under the statute of that province was acting administratively, but was under a compulsion to act judicially, i.e. fairly and impartially.

The same finding was made in respect to the Combines Commissioner in Imperial Tobacco v. Mc.Gregor in 1939, i.e. he was acting administratively not judicially, the investigation under review being an interim measure only which could not directly affect rights. But even here, where rights were not directly affected, the Court held that the Commissioner was under a duty to act judicially.

The comments of the Master of the Rolls in the recent English decision of Robinson and others v. Minister of Town and City Planning are enlightening when read with the two decisions related above. The MR stated that he did not dispute that the Minister must act on quasi-judicial principles while conducting a public enquiry under the Town and City Planning Act. But that was not the same thing as saying that the executive decision itself must be quasi-judicial. The enquiry being only a step towards decision, any argument is invalid which affirms that the courts can control executive decisions to make the order by considering the quantum of evidence at the enquiry. This would be to treat the executive decision as though it were a judicial decision. There is little indication that this decision will receive musch recognition by Canadian courts.

When examining the cases in the following ~~section~~ Chapter, it will be noted that, in the majority of cases where the court speaks of the curial function as judicial, it would have been more accurate to have termed the function, "quasi-judicial".

DEVELOPMENT OF THE CASES (I)

I. 1723-1911

No proposition in our field of study has a more venerable antiquity than that anybody determining any question affecting rights or property, must accord a hearing.

Mr. Tennant, in his able article "Administrative Finality" in the 1928 Can.Bar Rev. 498, considers that Capel v. Child is the "earliest considered case in which an English court of law placed its restraining influence upon an administrative agency."

However, even before the Capel Case, we find, in 1723, one, Richard Bentley, applying for a mandamus ordering the restoration of his academic degrees of which he had been deprived by the University of Cambridge. A court held in 1718 " according to the usage of the University" before the then Vice Chancellor, a member of the University levied a plaint in debt for £41.6s. against the said Richard Bentley, "and prayed process" against him. Bentley having contested the legality of the process bidding him appear at the next court, the next court considered a deposition from the beadle who had attempted to serve process, and thereupon suspended Bentley in absentia for contempt, ab omni gradu suscepto. Subsequently, at a University Congregation, the Vice Chancellor stated that the degrees could not be restored as Bentley had not yet submitted himself to the University.

Mr. Justice Fortesque ruled that the University was a corporation by prescription, and, as such, was subject to the court's jurisdiction, and must shew the removal to be for reasonable cause. He then declared that the process had been illegal, and finally delivered himself of the famous remarks, "Besides the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass judgment upon Adam, before he was called upon to make his defence. Adam (said God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst

(I) The decision to list selected cases chronologically was one that has not been lightly taken, It leads to inevitable overlapping, in that many of the decisons referred to, appear, sometimes at length under subsequent specific heads. The cases have been selected with some care to point up the introduction of new concepts and curial methods of approach. It further points up, as no other system could, the inadequ of the entire approach of hte courts to the problem.

not eat? An the same question was put to ive also.' (The King v the University of Cambridge 93 ER 698).

The failure to give notice was held fatal, as contravening natural justice, and mandamus issued ordering the University to restore the degrees. The case is a simple one. ect jurisdiction was vested in a special University body. The function was obviously judicial on any consideration. Necessity for due notice is a vital part of any judicial process. It is questionable whether the court has to speak in terms of natural justice at all.

In 1832, the case of Capel v. Child (1) was decided in the Court of Exchequer. A statute of George III provided that "whenever it shall appear to the satisfaction of any bishop, either of his own knowledge or upon proof by affidavit laid before him...... that certain conditions exist, he may order the vicar of a certain parish to nominate an assistant in default of which the bishop may appoint the assistant himself.' The statute was silent as to the procedure to be followed in issuing such an order. The bishop, pursuant to the statute, made an order to the vicar, the Reverend Capel, to appoint an assistant without granting a hearing to Capel. Capel refused. The bishop thereupon appointed an assistant. When the vicar refused to pay the assistant's salary, the bishop thereupon ordered the assistant to sequestre certain parish property, which was duly done. Next, the vicar brought an assumpsit for recovery of the property and succeeded. Lord Lyndhurst stated in judgement, p.571, "There is an authority given by the Act of Parliament for a monition, and the question is whether that authority, within the meaning and spirit of the Act, has been properly pursued, I am of the opinion that it has not.' He quotes the statute, 'whenever it may appear to the bishop either upon affidavit or of his own knowledge .. does not this import enquiry, and a judgement as a result of that enquiry? He is to form his judgment; it is to appear t before him, on the one side, without hearin whom the charge of negligence is preferred ..." That he is to come to that conclusion without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence...without having an opportunity of be mone it appears to me as a necessary consequence, th proceeds on his own knowledge, the same course

(1) ~~[illegible]~~ (1832) 2 CR & J 558

is necessary; because a party has a right to be heard for the purpose of explaining his conduct, he has a right to call witnesses, etc......it is against every principle of justice that the judgement should be pronounced, not only without giving him a chance to adduce evidence, but without giving him notice of the intention to proceed to pronounce the judgement."

There is no doubt here that the Bishop was an administrative tribunal acting administratively. Here, a century before the courts begin to differentiate between the nature of functions, we find the court defining the extent to which it will interfere in what are actually purely administrative affair . Said the court "The mandamus is a solemn call upon the Bishop to adopt the requisite means of duly informing his conscience." As a question of statute interpretation, the court could readily avail itself of the old rule imposed by curial solicitude for the rights of the subject, that there is a presumption against Parliament intending by statute to deprive the subject of his common law rights. There is, of course, a prior rule of interpretation that words must be given their logical, literal meaning unless there is ambiguity. Is there any real ambiguity in the provision that the "Bishop may decide on his own knowledge?" We find here a solicitude for common law rights that will form part of the integral matrix of the law and one that will persist with astonishing vigour , to be checked, if at all, by the quite recent realization that Parliamentary intent is sometimes derogatory of private rights in favour of collective rights.

Reg. v Justices of Montgomeryshire (1) was an application for mandamus to the Justices of M, commanding them to hear an appeal from the Churchwardens of L., against an order of two justices for the removal of a pauper family into their county. The appeal from the order had been given on 14 days' notice to the Court of Quarter Sessions, instead of 28 days as was required by the Rules of Practice of the QS. The Court had refused to hear the appeal. The question at bar was whether the rules of practice of the QS were so unreasonable that the court should interfere to compel them to alter their practive. Held, the QS are judges of their own rules of practice and the court will not

(1) [illegible] (1845) 3 Dow & L 119

interfere unless the rules on which they acted are so unreasonable as to be illegal". This typifies a long series of decisions of this kind, e.g. the Justices of Wiltshire, the Justices of Monmouthshire, the Justices of Lancashire, etc. Can a rule be so unreasonable as to be illegal? If so, an obvious carte blanche exists for curial interference. "Illegal" must surely be ascertained against an objective standard; "unreasonable" is a subjective concept, although in certain contexts, a certain stage may be reached where "unreasonable" might be generally accepted as synonymous with "violation of natural justice" The question of reasonableness is usually accepted to be one of law, and peculiarly susceptible to review on that account; however, as we have seen, Parliament frequently makes its statutory tribunals judges of reasonableness.

In 1850, the Bishop of Worcester ordered sequestration against the profits and emoluments of a certain vicarage where it appeared to the Bishop that the vicar had not established bona fide residence in his "damp, uncomfortable, hole of a vicarage," without obtaining his, (the Bishop's) permission. "Although, according to the statute (s.54 of I and 2 Vict. c.106), the fact of disobedience or absence is apparently made a condition precedent to the power of sequestration, it is clear from the context that the adjudication of that fact by the Bishop is all that is required...If then, the Bishop decides in due course that either event has happened, the truth of the fact can never be a matter of enquiry for a jury (court)...The Bishop then, acting judicially in this respect, the main question is whether....the sequestration...is simply in the nature of distress to compel residence, or altogether, in poenam (penalty) for previous non-residence...If it is the latter, the Bishop ought to have given the incumbent an opportunity to be heard before it was issued; for no proposition can be more clearl established than that a man cannot incur the loss of liberty or propert for an offence by a judicial proceeding until he has had a fair opportunirty of answering the charge against him, unless indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary." The court referred to Capel v. Child where the statute authorized the Bishop to proceed of his own knowledge, yet the express provisions did not prevail. Here, there was definitely no

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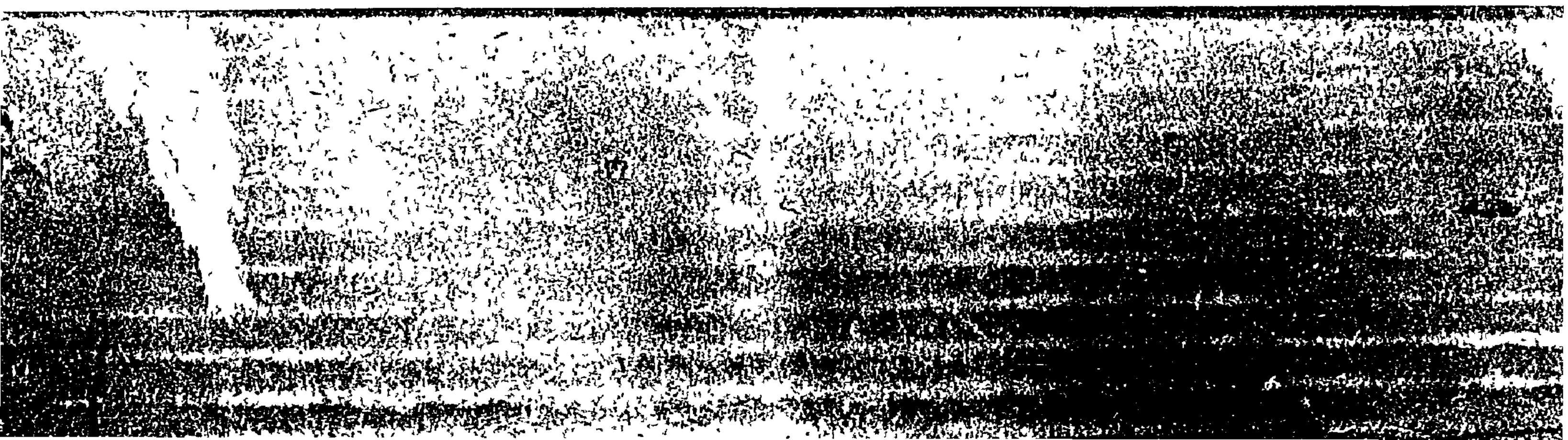

"stringent an arbitrary" that the court "will be slow to holo that they overri.e that soun an universally aoolicable principle of natural justice that no man shall be conoemne either in person or in oroperty without having an opportunity of being hear in his own efence."

Here, Byles J has characterize the function as ju.icial. There is no .isoute between parties, of course, the tribunal itself being the only oossible other party, besi.es Cooper, an a ".ispute" between a party an the tribunal itself is of cousse, unthinkable. The court oes not appear to rely on the tribunal's acting ju.icially to justify interference, as we have foun Byles, J. stating that notice must be given, even if the tribunal was acting ministerially. After the ecision to pull the house own ha been arrive at, the tribunal was in ee acting ministerially, but here there was a statutory requirement to give notice, which the Boar faile to observe. As a question of statutory interpretation, the court's ruling that notice of the hearing was necessary, was probaoly wrong. Specific mention of notice in respect to the or er woul clearly in icate legislative intent to oreclu e it in the case of the hearing where the statute was silent. (I)

On IOth. Septemeber, 1887, a publican, one William Re - ding, uly ap lie to the licencing justices of Kenall ivision of Westmorelan for the renewal of his licence, was refused. Sharp, the owner of the inn in question, apoealled to the Quarter Sessions, contending that, on an application for licence renewal un er the Liquor Licencing Act, the court coul not by law enquire into the character an wants of the neighbourhoo . S.I of the Licencing Act of 1828 requires justices to hol a general annual licencing sessions an they are empowere to grant licences to such persons as they shall, in the exercise of their iscretion eem fit an proper.

(I) In 1885, in Re Local Government Boar ; Ex Parte Commissioner for Township of Kingston I6 LR Ir. I50, the court refuse prohioition stating that the procee ings of the tribunal un er review were neither "ministerial nor ju icial, but 'quasi-legislatice'." The Court of Appeal agree , saying " the bo y in question...having been given legislative powers an Parliament having elegate to it a portion of its powers, the court....shoul not interfere in such a case."

Mrs. Sharp had spent large sums of money on the assumption that the licence would be renewed. It was contended that the legislature coul never have intended the justices to exercise so wide a discretion over property rights. Lord Halsbury LC stated that the injustice could not be so great as to prevail over the plain language of the legislature. He then delivered himself of the famous pronouncement "an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and "discretion" means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of justice and reason, and not according to private opinion, according to law and not to humour. It is to be, not arbitrary, vague and fanciful, but legal and regular, and it must be exercised within the limits to which an honest man competent to discharge his office ought to confine himself." He quoted Reg. v Boteler,(1) where justices thought proper not to interfere or enforce the law because they considered the act in question was unjust in principle. The Queen's Bench compelled them to do the act which nevertheless the statute had said was in their discretion. He referred, too, to Reg. v. Sylvester,(2) where "overseers" were required to decide whether applicants were real residents and rate-payers of the parish, and it was held that they weren't entitled to refuse the certificate on the ground that there were too many ale-houses on that the beer was not required." It is contended that had the rules for assessing the nature of the tribunal's function been evolved at the time of this decision, the dicta would probably not have been voiced. In Reg.v.Sylvester, the justices were guided by the objective standard of the statute, being restricted thereby to certain considerations as to qualifications, which statutory requirement they exceeded, resting their finding on other grounds. This was a clear case of excess of jurisdiction, and were accordingly amenable to curial interference. In Reg. v.Boteler, justices were authorized by statute to issue a distress warrant if they shall think fit. There is no objective standard here, and it is contended that an absolute discretion was granted, administrative in nature. A court would not then be justified in examining the nature of the justices' refusal to exercise their discretion in one way or another.

(1) Mews Dig. VIII 598, ~~[illegible]~~
(2) " " VIII 416

There would seem to be little doubt however that the Lord Chancellorrested his decision on statute interpretation , although even on these grounds there might be considerable quarrel with the judgement. It is difficult to justify an interpretation of a statute granting a discretion to persons whom the tribunal 'deem fit and proper", as giving a discretion to decide on " the needs of the neighbourhood.' Futhther, Lord Halisbuty speaks very loosely of the necessity for exercising a licencing discretion "according to law". He could not have intended that the justices keep track of their decisions and act under an obligation of applying them in the future under substantially similar circumstances. His pronouncement is clarified perhaps by his further statement that the discretion must be exercised judicially, i.e. according to reason, etc. The LC, however, took the function to be judicial, according to M Gordon, in contrast to the other law lords. Gordon insists that he was in fact quoting the express words of Lord Mansfield in R. v Willes, who was speaking strictly of the pure judicial function. If he did, he was being inconsistent in that he had applied the dicta in respect to discretion which he had previously characterized in the broadest terms, that of licencing. ([illegible])

The first occasion that the writer can find where the court referred to the function of a tribunal as administrative was the Royal Aquarium v. Parkman, 6I LJQB 409, in which a meeting of the London County Council held for the purpose of hearing applications for music and dancing licences was held to be administrative and not judicial. Accordingly, a statement of a member of the tribunal that the applicant gave an indecent performance, was held not to be privileged in defending a defamation suit. Lord Halisbury, in assessing the functions of a licencing board of justices, agreed that they did not appear to come under the description of a court."Where justices are acting as a court of any sort, they must proceed according to the regular rules applicable to all courts of justice, but in respect of an application for a licence...they may...receive representations not on oath. Their meetings must be public." He goes on to say that Lord Kenyon in I790 (R. v. Downey), held a licence bad because it was granted at a private meeting mot upon the principle that all courts

must [illegible] but upon the ground that statute directed it. In this case, no distinction was necessary between administrative and judicial, but [illegible] on the question whether justices sitting as a licensing body were a "court" within the meaning of the Summary Jurisdiction Act, so as to determine whether an appeal lay under s. 31 of the Act. It had been contended for the respondents that an objector to a licence was a complainant or informant, the refusal to [illegible] the licence [illegible], and that "a court of summary jurisdiction" meant a body of justices or justices acting as such, and that the statutes [illegible] justices acting as such in all cases courts, but that they put them in the same position as courts of summary jurisdiction for the purpose of certain provisions regarding procedure." Such contentions were not valid.

By s.9 of the Public Worship Act of 1874, it was provided that, upon a representation that unlawful alterations or additions to the fabric or furniture of a cathedral had been made, the Bishop should take steps toward trial of the offender, "unless he shall be of the opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representations, in which case, he shall state in writing the reason for his opinion..." The applicants for mandamus contended that the Bishop in his written refusal, had not considered relevant factors, had not "considered the real nature and effect" of the complaint. "Again, the Bishop's observations as to the evils of litigation shew that he has considered matters not within his province." The Bishop had not exercised his discretion in a judicial manner. They contended, "Supposing he said.. or it was notorious that he thought...that the Act was mischievous and that no proceedings should ever be brought under it. Such an exercise of discretion was no exercise at all (Reg. v Boteler). Lord Halsbury disagreed with the first contention. "It is to my mind obvious that if the only discretion intended to be vested in the Bishop was a "particular" discretion, that is to say, whether the complaint was frivolous or that there had been really some infraction of the law it would have been very easy to find appropriate language to give effect to such a provision; but the language of the legislature has been careful to show that the discretion of the Bishop is not.........

so fettered.' Lord Bramwell explained, then it was said that there was something he had considered which he ought not to have considered, and something he had not which he ought to have, and so he had not considered the whole circumstances and them only. It seems to me that this is equivalent to saying that his opinion can be reviewed...if a man is to form an opinion...he must form it himself on such reasons and grounds as seem good to him." He goes on to concur in Reg. v. Boteler, saying that a pronouncement that no proceedings should be taken under the Act at all would be in effect a denial of jurisdiction. The court seemed unanimous in holding then, the Bishop's discretion unfettered, subject to the Reg. v. Boteler Rule. This is a clear case of administrative discretion, which was attacked as unreasonable. There were no contentions that 'natural justice" had been denied, personal or property right considerations were at a minimum, and the court had a clear road to refusing interference. It was true that the statute required the submission by the Bishop of reasons in writing for refusal to prosecute. Did this disclose legislative intent to make his decision reviewable? The court held against this, stating the constitutional necessity of the highest court (from which no appeal lay), giving reasons for judgement. This reason is perhaps, not too pertinent. The judges 'reasons for judgement" state the law, hence the necessity a fortiori of their disclosure by the highest, i.e. the most authoritative courts. The legislature could not have had this reason for requiring written reasons from an administrative tribunal. If the equities of this case had been more pressing there is every reason to believe that the court would have indicated small reluctance in seizing upon this particular as justification for granting the requested remedy. However, as it is, there is no reason for quarrelling with the decision. (Allcroft v. London 1891 AC 666).

MD iv 1138

Ex parte Harrington involved the discretion of justices to refuse licences for theatrical performances in non-metropolitan cities or boroughs, under 6 and 7 Vict. c.68 s.5 which enacted that on a certain requisition by two justices, the justices " shall hold a special session for granting licences for theatrical performances."

The Cardiff Philarmonic Music Hall Co., under Mr. Harrington, after great expense, were refused a licence under the subject Act, the justices assigning no reasons for their decision. Harrington moved for a mandamus ordering the justices to hear and determine the application for a licence contending that they had not heard and determined the application according to law, as they had no discretion to refuse, all the statutory conditions having been complied with. Mr.J Field, listening to argument of the applicants on the mandamus motion, asked if the justices were merely acting ministerially, as was maintained by the applicant, why were sessions called for by the Act? Have the justices no power to refuse licences, say, if there are inadequate fire exits? Must they licence unsafe buildings?

Field J. "You apply for a mandamus to the justices to hear and determine the application. They heard the evidence, and decided against the applicant.

A. "Not according to law."

Field J. "How can we see that?"

A. "They gave no reasons."

Field J. " They were not bound to."

A. "It does not appear that they have exercised a discretion."

Field J." How does that appear?"

A. "No evidence appears to warrant such an exercise of discretion...It appears that they acted only from the notion that one theatre was enough."

Field J "That does not appear, but if it did, why should they not consider that?"

The mandamus was refused, discretion being inferred from the statutory necessity of holding a special session, and the absence of wording to the effect that the justices "shall grant".

The Licencing Act of I869 (32 and 33 Vict. c.27),did, in fact, impose restrictions on the exercise of the discretion of the licencing justices. A renewal of a licence of premises which were in existence on May I I869, should not be refused except on four specified grounds; (I) that the applicant had failed to produce satisfactory evidence of character; (2) that the house was disorderly, and badly conducted; (3) that the applicant had previously been disqualified; (4) that the house was not qualified for a licenced house.

The only ground on which the [illegible] found to [illegible] have been refused here was that he had refused to produce [illegible] evidence of good character. [illegible] satisfied the court of his good character, then the court had no jurisdiction to refuse the renewal on any other ground whatever." The original notice to the applicant [illegible] that the renewal would be contested at the next licensing sessions [illegible] conviction [illegible] "[illegible]". The applicant [illegible] was one to give evidence of good character. The court found him to be a respectable man, but dismissed the appeal on [illegible] justices of Manchester [illegible] locked together, [illegible] Manchester. [illegible] to do with th 'good character' [illegible] the mandamus. The court had considered [illegible] which they had no concern, and had therefor exceeded their jurisdiction." It was fortunate that the Quarter Sessions stated reasons for dismissing the appeal. Otherwise, no doubt, the court would have considered itself barred from reviewing evidence leading to the decision. The decision was based on statutory interpretation only. The function was, of course, not judicial as no dispute was involved and the discretion was unrestricted within the limits set out in the statute. However, the statute had imposed limits within which the discretion was unconfined, and it was the court's duty to rule on jurisdiction. No question arises as to the suitability of the remedy being conditioned by the nature of the function, as we have seen that mandamus is not restricted to review of judicial functions only. (R v Lancaster JJ [illegible]).

Raven and Others v JJ of Southampton,(1) an application for the renewal of a public house licence was turned down on the grounds that there were too many public houses in the district. Only one notice of objections had been served by the justices and that to the present applicant. It was contended that a licence will be renewed unless there is some good ground for refusal (Sharp [illegible]), and this renewal can be refused only on some

(1) 73 L.J. K.B. 282

grounds personal to the applicant (Licencing Act 1874 s.[illegible]), and in this case, the actual reason for the objection was common to all public houses of the neighbourhood, not that of the applicant exclusively. It was contended for the respondents (the Justices), that the fact that the notice of objections had been served on the house in question and the fact of the refusal of the licence renewal were sufficient to justify the conclusion that this house was differentiated from the others in the neighbourhood. The majority of the court held that justices must have before them **some** evidence as to the particular public house before they could act. In R. v. Howard 1902 2 KB 363, quoted in this case, where there was evidence of the existence of a great number of public houses within a limited area, notice of objections were served on all, so that the justices could ascertain the relative merits of each particular public house. Here, the only evidence before the justices was a map showing the great number of public houses in the locality. The justices had to rely upon the differentiation. It was stated in the majority judgement that the justices were acting judicially, i.e. weighing the merits or so long as what licences should be taken away and what retained. Lawrence, J. goes so far as to say, "I cannot see how they (the justices), acted judicially if they have merely taken a prima facie case." If it were not for this erroneous finding that the justices were acting judicially, we would have authority for the proposition that the reviewing court can rule on the sufficiency of evidence before a tribunal acting administratively. In fact, a finding as to the function [illegible] appea[rs] unnecessary, as there was a clear excess of jurisdiction on a reading of the statute, and the remedy was mandamus.

The statute 29 and 30 Vict. c. 31 permitted a parish vestry to grant a superannuation to a servent retired as a result of disability to perform his duties, such superannuation "not to exceed two-thirds of his salary, regard being had to the hereinafter scale of allowances..." Applying this scale, the vestry authority found Mr. Westbrooke entitled to 230£ per annum. They were of the opinion that this sum was too great. They thought they were bound by the scale, and

refused a superannuation altogether. It was contended that the vestry had really decided that the applicant was entitled to a pension, but refused to grant it because they had not understood that they had discretion to award all or any part of the sums set out in the scale; accordingly, they had not exercised a proper discretion. Lord Esher said, "The vestry must fairly consider the application and exercise their discretion fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion, take into account matters which the courts consider not to be proper for the guidance of their discretion, then, in the eye of the law, they have not exercised their discretion." The decision is in line with the Boteler Case, of course, but Lord Esher's sweeping dictum to be very loose even for the relatively undeveloped state of the law on this subject which prevailed at that time. Further, the decision is authority for curial intervention in a purely administrative proceeding on the ground that the tribunal erred on a matter of law. There is no doubt, of course, that the decision was salutary on equitable considerations. (But R. v. ... Vestry v. Battersea, MD IX 1149)

S.26 of the 1872 Licensing Act stated, "The local authority of any licencing district, upon the production of such evidence as such authority deem sufficient to shew that it is necessary or desirable so to do for the accomodation of any considerable number of persons attending any public market or following any lawful trade or calling...may grant, if the authority thinks fit, to licence any victualler...in respect of premises in the immediate neighbourhood of such market, or of the place where the persons following such lawful trade or calling....an order exempting such person from the provisions of such Act, in respect to closing of his premises on such days and during such time..as may be specified in the order. Purporting to operate under this section, the local licensing justices exempted 12 out of 14 licenced premises in the area for three months (permitting them to remain open at night for an extra hour). The court held that that the statutory exemptions were intended to apply at nigt railway porters and some particular public houses; here, the justices applied the extension to all trades generally and to most public houses

generally. Per Lord Alverstone, "It is perfectly clear that they have not acted upon a consideration of the section, but have assumed a jurisdiction which they do not possess to extend the hours during which liquor may be sold, merely because the general body of the inhabitants desired it. In this case, it was argued that the orders made by this tribunal were not "judicial orders", and that consequently certiorari would not lie. The court distinguished the cases of Boulter v. Kent and Reg. v. Sharman, where it had been held that licensing justices did not constitute a court and that certiorari did not lie, from licensing justices acting as a confirming authority. Vaughan Williams LJ was quoted by the court, "I do not think that it necessarily follows from ..Boulter v. Kent that a writ of certiorari will not lie in respect of proceedings before the licensing meeting — on the ground that a certiorari will only lie to bring up the order of a court properly so called. I think that, wherever a body such as justices under the provisions of a statute to grant or withhold a certificate...,and it appears from the statute that they have to exercise a judicial function, in so doing, a certiorari would lie to bring up proceedings before them, in the case of erroneous exercise or excess of jurisdiction whether or not they could be been said to have acted as a court in the strictest sense of the word." It is easy to argue of course, that the function was not judicial, even though the justices here were acting as a confirming authority. There is still no lis inter partes; just as the court of first instance in a law appeal is in no sense a party to the appeal, so the tribunal here cannot be a party before the confirming tribunal. The granting of the privilege of a licence can never involve dispute. So we are thrown back once again on the basic nature of curial interference in a great number of cases, namely, the view of the court that the decision of the tribunal is ultra vires the statute that gave the tribunal birth. Here, however, where certiorari was the requested remedy, the court is squarely faced with the necessity of making a finding that the function of the tribunal is judicial; otherwise, it must accede that it has no locus standi to interfere, or act with considerable misgivings in the teeth of strong compulsion to the contrary. This is the great anomaly of this branch of law.

2. Cases - 1911-Present

It was in 1911 that the House of Lords first prescribed the nature of the hearing required of an administrative tribunal in Board of Education v. Rice 1911 AC 179, a case of great significance, which was applied as late as 1949 in England (R.v.Paddington 1949 All ER 720) , and in Quebec as late as 1951. A local education authority refused to pay salaries to teachers in a "non-provided" school at the same rate it paid the teachers in provided schools. The managers of the non-provided schools complained and the Board of Education ordered an inquiry. The Inquiry did not contain answers to the following questions which had to be determined pursuant to s. 7 of the Board of Education Act 1902,i.e. whether the local education authority have, in fixing and paying teachers' salaries, fulfilled their duty und s.7(I) of the Act; whether the salaries inserted in the teachers' present agreements are reasonable in amount and ought to be paid by the authority or what salary the authority ought to pay. The Board gave its decision in a document which failed to deal with these issues according to the sta tute. S.7(3) of the Education Act provided, "If any question arises under this section between the local education authority and the school managers, that question shall be determined by the Board. "We have, then, a statutory duty in the Board to determine this question,. Lord Loreburn said, in giving judgment, "comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments and officers of state the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes from determination, is sometim a matter to be settled by discretion involving no law. It will, I suppose, usually be of an administrative kind; but sometimes, it will involve a matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either, they must act in good faith and fairly, listen to both sides, for that is a duty lying upon everyone who decides anything. But, I do not think they are bound to treat such a question as though it were a trial. They ahave no power to administer an

oath and need not examine witnesses. They can obtain information in any way that they think best, always giving a fair opportunity to those who are parties in the controversy, for correcting or contradicting any relevant statement prejudicial to their view....The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences....The Board is in the nature of an arbitral tribunal and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But, if the court is satisfied with the Board's having acted either contrary to the requirements in the way I have described or have not determined the question, which they are required by the Act to determine, then there is the remedy of mandamus or certiorari." The decision was quashed by certiorari and mandamus issued commanding the Board to determine the question required by the statute. Here we have no differentiation of functions, but a clear ex cathedra exposition of the requirements of a hearing by any tribunal -- "for that is the duty of anybody who decides anything." This is a pronouncement of the highest judicial authority.

In I9I5, Local Government Board v Arlidge came before the House of Lords (I9I5 AC I20). The respondent, (the successful applicant for certiorari in the court below), was the assignee of a lease of a dwelling house. Acting under the House and Town Planning Act of I909, the Borough Council made a closing order of the house on the grounds that it was unfit for human habitation. Upon appeal, the closing order was confirmed after the Local Government Board appointed an inspector to hold a public enquiry, and Arledge had attended with his solicitor. The inspector, after inspecting the house submitted the report, togehter with shorthand notes of the proceedings to the Local Government Board. Arlidge then applied for certiorari on the grounds (I) that the hearing of the appeal should have been determined by the Board themselves or by someone lawfully authorized to act for them in such as the order did not disclose by which officer the appeal had been decided; (2) that the hearing of the appeal should have been oral; (3) that Arlidge was entitled to see the report of the inspector.

Viscount Haldane, in the House of Lords quoted Lord Loreburn in the

in the Rice Case. He found the Local Board to be an "executive board" with a duty of enforcing obligations on the individual which are imposed in the interests of the community....When the duty of deciding an appeal is imposed those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the cse made. The decision must be come to in the spirti and with the sense of responsibility of a tribunal whose duty it is to mete out justice...but what the procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration rather than the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial...provided that the work is done judicially and fairly in the sense indicated by Lord Loreburn, the only authority that can review what has been done is Parliament to whom the Minister in charge is responsible." He found, further, that the Hampstead Borough Council itself had been acting administratively and the case was not a lis inter partes. Here, again, however, no real distinction between administrative and judicial functions was madd, although the assumption is that the court would have interfered if it found " denial of natural justice." regardless of the function.

Dicey states that the only principle really decided by these cases was that a " Government department, when it exercises judicial or quasi-judicial jurisdiction under a statute, is bound to act with judicial fairness and equity, but is not in any way bound to follow the rules of procedure which prevail in England in English courts." He likens the quasi-judicial function to the running of a business, although he states somewhat nostagically that a great number of administrative questions could have been left fot the courts in a country like England "where the strict rule of law has been for generations accepted by the people." "But, we must remember that when the state undertakes the management of business properly so-called, and business which hitherto has been carried on by each indevidual citizen simply with a view to his own interest, the government

or in the language of the English law, the servants of the Crown, will be found to need the freedom of action necessarily possessed by every private person in the management of his personal affairs.. the two things must in many respects, be guided by totally different views."

After this remarkably tolerant disquisition by the "champion of the rule of law", he discusses the effect of a transfer by statute of judicial functions to a government department from the courts; two views may be taken; (I) the government department (e.g. the Local Government Board) acts like a judge and is bound by judicial procedural rules (the court of Appeal arrived at this decision); or (2) the fact of the transfer of jurisdiction from a court to a government board is prima facie evidence that P arliament intended to dispense with procedural rules and to adopt rules " which govern the fair transaction of business by the Board. Dicey thought that the particualr view adopted reflected the legislative opinion of the time. He goes on to elaborate on two checks to abuse of judicial or quasi-judicial power by the legislature; (I) the agency must conform precisely to the grant of power of the statute, and (2) a government department must exercise "any power which it possesses and above all, judicial power, in the spirit of judicial fairness and equity. (House of Lords in LGB v.A rlidge). Dicey conceives it to be unfortunate that the Lord Chancellor in Arlidge refers to ministerial responsibility which he deems largely illusory as being directed merely to responsibility to the majority party in Parliament, who would not prejudice their legislative existence by overtly querying the ministerial action.

The facts in Leeds v. Ryder and Others I907 AC 420 follow. An English county borough corporation under statutory powers for the improvement of a district bought land in the borough, including licenced premises, dismantled the premises and put in caretakers with a view to surpressing unnecessary licenced premises on payment of compensation to the corporation under the Licencing Act of I904. These caretakers, in accordance with an understanding between the corporation and the licencing justices, applied for renewal licences. Some of the justices were also members of the corporation. They granted renewals sub-

court on contentions. that the caretakers were not persons keeping or about to keep alehouses nor were they real resident holders and occupierws under the statute, and also on grounds of bias on the part of some of the justices. Lord Loreburn stated in judgement that the " requirements" of persons to whom renewals would go was "descråptive" and the statute expressly leaves "to the discretion of the justices whether they will grant licences or not to persons whom they deem fit and proper persons.. " They (the justices), are not bound to enter into detail upon such enquiries. I f they think, in the exercise of their discretion, it is a proper case to send forward to the Quarter Sessions, they are entitled to act. They must act, of course, honestly, and endeavour to carry out the purpose and spirit of the statute....The justices under the Act of I904, act administratively for theyare exercising a discretion which may depend upon considerations of policy and practical good sense...and they must, of course, act honestly. That is the total of their duty." Here we have clear indication of curial recognition of the new phenomenon. We find no recognition, however, these new tribunals owe the duty of exercising their functions "honestly", and in the "spirit and for the purpose of the statute" to the Minister and through him, to Parliament, but rather the belief that the courts are still the proper medium to exercise the ancient surveillance surviving from their traditional role in correcting and supervising judicial bodies. There is no indication of the machinery by which the courts are to effectuate this surveillance in the case of purely administrative bodies!

I n I924 we find the Court of Appeal extending the sphere of curial interference to a case where the order complained of was provisional only, subject to confirmation by Parliamentary resolution. (R. v. Electric Commissioners I924 I KB I72.). The Electric Commissioners were constituted by the Electric (Supply) Act of I9I9, being appointed by the Department of Transport, and possessing wide powers for the purpose of organizing the supply of electricity to the country. Under the Act, they could set up provisionally separate electric districts, and form schemes for improving electric supply in any district so formed. They were enjoined to hold local enquiries upon the schemes. Such scheme could set up a "joint electric authority" within the district. The joint authority were authorized to delegate

their duties to committees. By s.7 sub.s.I, the Commissioners were authorized to make an order giving effect to a scheme embodying the decisions they arrive at after holding allocal enquiry, presenting the order to the Minister of Transport for confirmation, and laying it before each House of Parliament for passage by resolution. When so approved, the order was to have effect as if enacted in the Act of I9I9. Prohibition and certiorari were applied for by interested companies to prevent the Commissioners from proceeding with a scheme published by the Commissioners in I923 providing fot the appointment of a joint electric authority in the London area defined in the sheme. The writs were held to lie even though the report objected to needed the confirmation of the Minister of Transport and resolution by both H ouses of Parliament to make it operatige. Bankes LJ stated, "The Electric Act imposes upon the Commissioners very wide powers and very pesponsible duties in reference to the approval or formulation of schemes. At every stage they are required to hold local enquiries for the purpose of giving interested parties the opportunity of being heard. On principle and on authority, it is my opinion open to this court to hold, and I consider it should hold, that powers so far reaching, affecting as they do individuals as well as property, are powers to be exercised judicially, and not ministerially or merely proceedings towards legislation."

Firstly, we find a statement that powers must be exercised judicially merely because they are "far-reaching",if, non sequitur, they affect individuals or property...what powers don't? We have found this proposition before, but it becomes nothing less than flagrant under the particular circumstances of this case . Had the Electric Act required approval of the order by an actual act of Parliament, then surely the court would have had to treat the report as mere "proceedings to legislation". If anyone was to "shoot it down" surely it must be Parliament,whose agent the statutory body was. What difference is there that the Electric Act requires confirmation by resolution rather than by act..does that change the nature of the proceedings? According to the separation of powers theory so dear to the courts, what else can Parliament do but legislate... whether by act or by resolution? Here, then, we have a report restrained by certiorari, which was advisory and provisional only, and which, even

though it arose as a result of the exercise of judicial functions, which it didn't, could have had any effect only as a legislative measure.

Confusion is practically complete when we turn to R. v.London County Council 1931 AC 215. The LCC granted a licence to operate a cinema to the applicants under the authority of the Cinematograph Act of 1909, which provides that a licence may issue on such conditions and under such terms as the council might determine. The licencees appreached the LCC with a view to ascertaining that body's course of action were they to hold Sunday performances, which was prohibited by statute.(Sunday Observance Act of 1780). A clause repeating the statutory prohibition had been included in the licence certificate and the application by the licencees took the form of a request to remove the condition from the licence. The LCC passed a resolution to this effect purporting to act under the authority of the statute which provided that the Council may waive any licence conditions. The Court of Appeal held that the certificate should issue to bring up and quash the order of the LCC as having been made without jurisdiction, the Council having no power to dispense with the criminal law of the country as represented by the prohibitions of the Sunday Observance Act. Scrutton LJ, after holding that certiorari would issue only in respect to judicial proceedings, regarded the functions of the County in this case as synonymous with the functions of licencing justices. "Since the case of Rex v. Woodhouse, it is quite clear that every proceeding of magistrates or confirming authoriteis in granting new or renewing old licences is in the nature of a court, excess of jurisdiction of which can be dealt with by the writ of certiorari." This is an amazing disclosure. R. v. Woodhouse had been reversed by the House of Lords sub nom Leeds v. Ryder (supra), where we find Lord Loreburn explicitely stating, "The licencing justices..act administratively.." The Cinematograph Act s.2 sub.s.I states " A county council may grant licences to such persons as they think fit." It is obvious that an applicant can have no legal right to a licence; the grant of a licence is a privilege, as has been argued at length supra. Both Scrutton and Slessor LJJ, state that a tribunal is judicial where applicants are heard and also any opponents together with evidence adduced on each side. W e have previously argued at length on the

Erratum. Line 17. For "certificate" read "certiorari"

fallacy of classifying functions on the basis of procedural attributes.

Where, however, a member of a tribunal claimed privilege in a defamation action on the basis that the function of the tribunal was jddicial, the reviewing court failed to exhibit the usual curial propensity to accord judicial status which we have witnessed in the majority of cases to date, where the locus standi of the court to interfere rested on such a finding. The tribunal in question was a Court of Referees acting under the English Unemployment Insurance Act of 1920. The plaintiff sued for libel an insurance officer who had made a report to the Court of Referees in respect to a claim upon the unemployment insurance fund. The defendants contended that the officer's communication formed part of the proceedings of a tribunal acting in a manner similar to a court of justice, and was acting under absolute privilege. Horridge J. distinguished sharply between the judicial duties of a judge in court and administrative duties which need not be performed in court but in respect to which it is necessary to bring to bear a judicial mind. He claimed that the Court of Referees "is not a body deciding between parties nor does its decision affect criminally or otherwise the status of an individual". On this ground alone he declared the functions to be administrative, and the claim of privilege failed accordingly. By reference to the previous decisions reviewed, we see that the basis of distinction here was exceedingly narrow. A body of this nature is expected to act " judicially" but is denied the protection accorded a judicial tribunal. This and similar cases, of which there are not a few might be taken to provide some justification to those observers who contend that the courts are inherently hostile to the growhtof these statutory bodies, and who would contend that, were the proceedings under review an application for a prerogative writ, to restrain the body in questinn, that the courts would not have evinced so much reluctance to categorize the function as judicial. (Collins v. Whiteway 1927 2KB/ 378) .

The Agricoulatural Marketing Act 1931 provided for the formation of Milk Marketing Scemes. S.8(1) of the Act stipulated "The making of the order shall be conclusive evidence that the requirements of this Act have been complied with and that the order and the scheme approved thereby have been duly made and approved and are

within the powers conferred by the Act." Here, the Milk Marketing Board directed a fine of £50 againt a milk retailer for selling below the stipulated price. It was argued that the rule nisi for certiorari should be discharged because (I) the proceedings were not judicial but administrative under the scheme of the Act, and could not be subject to certiorari;(2) if there had been judicial proceedings, the Divisional Court could not retry the proceedings before the Board on order to see whether there was evidence on which the Board could act;(3) that under the scheme itself, the proceedings , whatever their nature, were such that those who framed it did not intend that the ordinary proceedings of a court of justice should be followed. The Lord Chief Justice quoted A tkins LJ in the Electric Commissioners Case that the writs will lie to control proceedings of bodies not courts of justice "wherever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially , act in excess of their legal authority, etc." In his opinion, the Milk Marketing Board came within these terms. Here, we have the imposition of a penalty, a circumstance which a court always scrutinzes jeaulously, but there is nothing in the decision to indicate that this factor influenced the court. We have the duty to act judicially again, in the limited sense of requiring an honest hearing, applicable to every tribunal which decides anything. The rule was made absolute on the grounds that the applicanthad not had a fair hearing in that he had arrived late and had not had exolained to him nor had he had an opportunity of contradicting, statements made prior to his arrival. The court ruled that the resolution imposing the penalty had been made without jurisdiction. (R. v Milk M arketing Board I934 50 TLR 559.)

In Errington v. Min. of Health I934 5I TL R 44, a clearance order under the English Housing Act, I930 was approved by the Minister. Members of the Minister's staff officially inspected the area in question, but no notice was given to the appellants. The Act provided that the Minister should consider any objections put forward and it was contended that that implied that he must consider the question judicially. For the minister, it was contended that he was acting ministerially and could inform his mind any way he pleased. The court held that when a property owner had raised objec-

tions, the Minister then ceased to be acting in a purely administrative capacity and was acting quasi-judicially. This case is the first leading case noted by the writer in which "quasi-judicial" is mentioned by name. Maugham J thought that, under a clearance scheme where there are objections by property owners, there is a contest between the owners of property and the local authority,i.e. there are two sides between whom the Minister must decide. This seems to be rather an astonishing view, that Parliament's delegates, the local authority, should find themsleves parties in a contest over legal rights, with the Minister to whom they are responsible acting as judge. The local authority itself is the public, a proposition that received judicial sanction in Tynemouth v. A/G 1899 AC 293.

Thus, it would appear at this juncture, that the invidious " quasi-judicial" rules the field. With the power to thus characterize functions the courts would appear to have the last word in controlling the course of legislation, even though such course must needs be a negative one.

3. Cases - Recent Canadian Decisions

Firstly, we will take a look at a fairly recent tax case of the utmost significance in which the court saw fit to interfere with the statutory discretion of the Minister of National Revenue. (Wrights'Ropes Ltd. v. MNR 1946 2 DLR 225). The Minister, in ruling on the subject company's tax exemption had before him a report of the local Revenue inspector which was not made known to the Company. Per Kellock J in the Supreme Court of Canada,"The Minister was acting in a quasi-judicial character. Therefore, the appellant was entitled to have produced to him before the assessments were made, the report in question and to have an opportunity to meet whatever it contained." A futher point was made,"In order that the Minister might allow any excess over what was reasonable or normal for the appellant company's business, he first had to determine what was reasonable or normal ... one of the facts before the Minister in exercising the duty cast upon him by the statute was the agreement under which the commissions were paid. It was not open to the Minister to ignore the agreement..there is no standard here by which the commissions in questionn can be shown to have been abnormal with respect to its business. Accordingly,

the disallowance can only be based on unreasonableness. The formal decision of the Minister throws no light as to the grounds upon which it rested...the decision is made to appear as a purely arbitrary one." Esteh, J, characterized the Minister's functions as "A judicial discretion similar to that under the then s.5(I)(b) which Davis J described as "an administrative duty of a quasi-judicial character. ..a discretion to be exercised on judicial principles, or proper legal principles."(Pioneer Laundry v MNR I939 SCR I)..."The courts have consistently exercised the power to determine in a given case whether the discretion has in fact been exercised within proper limits and upon proper grounds,or,in other words, to determine if the discretion has been exercised as contemplated by the terms of the statutes...." As the inspector's report was not produced, and there was no further evidence on the record to provide a basis for the determination of what would be a "reasonable and proper expense" within the meaning of the statute, the question had not in fact been determined by the Minister at all."Upon principle"stated Estey,J, "it would seem that to act upon insufficient facts or information should, in the result, be the same as acting upon improper facts as in Pioneer Laundry v MNR I939 SCR I....The ruling of the Minister does not disclose any reasons. No doubt he had what appeared to him perfectly sound reasons for his decisions, but none are before us. It is not for the court to weigh the reasons but we are entitled to know what they are, so that we may decide whether or not they are based on sound and fundamental principles." Kerwin,J entered a strong dissent being of the opinion, inter alia, that the power conferred on the Minister was a purely administrative one, even if it were held to be of a quasi-judicial nature, and that the appellant had been given a fa opportunity to be heard,etc." The majority opinion of the S upreme Court was confirmed ojn appeal to the Privy Council. T he Privy Council makes it <u>undertain</u> as to the extent to which a statutory provision for appeal to the Exchequer Court provided by the Act, influenced their decision, merely stating, " the right to appeal must...have bee intended by the legislature to be an effective right. This involves the consequence that the court is entitled to examine the Minister's determination, and is not necessarily to be bound to accept the

...it can be shown that the Minister has

acted in contravention of some principle of law, the court....cannot interfere; the s. makes the Minister the sole judge of the fact of reasonableness or normalcy and the court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not arbitrary exercised according to his fancy (Sharp v. W akefied) .. "The court is always entitled to examine the facts shown by evidence yo have been before the Minister when he made his determination;... here the determination can only have been an arbitrary one."If, on the other hand, there is on the facts shown to have been before the Minister sufficient to support his determination the court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion."

It is interesting to attempt to reconcile this decision with the Pure Springs Co. v. MNR,decided earlier the same year, in the E xchequer Court. Per Thorson J., "The test of the correctness of the disallowance of an expense is not whether it is in excess of what is normal as a matter of fact, but whether it is in excess of what the Minister determines in his discretion to be reasaonable or normal."(We see that the decision of the Minister was on the precise point in dispute in the Wrights'Ropes Case)." The standard of correctness is the opinion of the Minister; it is a subjective one belonging exclusively to him. The court has no right in the absence of specific statutory authority, to measure it by any standard of its own, or by any objective standard such as that of the "ideal reasonable man"... His determination is an administrative act, but his determination is more than that....(it is) really a definition of policy. Parliament had thus in effect, conferred a power of tax imposition on the Minister. This makes his determination not only an administrative act but also a quasi-legislative one." Thorson J went on to declare that there was no lis inter partes before the tribunal, and that the Minister was not acting in a judicial capacity. If the existence of a lis inter partes was the sine qua non of curial interference, there would have been precious little success in the multidudinous applications for prerogative writs over the long preceding years. In only one case that we have reviewd so far have we been able to discren a genuine lis inter partes (K. v. University of Cambridge). The standard, as we have seen to da te has been that of the "quasi-judicial".

Thorson J continues, " The court has no right to examine into or criticize the reasons that led the Minister to his opinion, or question their adequacy or sufficiency." Again, "The only ground on which the court can interfere is if the Minister does not apply proper legal principles."

The court in Poizer v. Ward (post), took the view that there was nothing in the judgment in the Wrights' Ropes Case to cast any doubt on the accuracy of the statement by Thorson J just quoted. We recall that the court in the Wrights' Ropes Case stated,"...if the facts before the Minister are in the opinion of the court insufficient in law to support the decision the determination cannot stand." When this is compared to the statement in Pure Springs, "The court has no right to examine into or criticize the reasons of the Minister or question their adequacy or sufficiency," it is difficult to perceive the basis of the belief of the court (the Supreme Court of Canada), in the Poizer Case that these decisions do not conflict, on first sight. However, although it does not seem to have been generally observed, the Supreme Court in Poizer V Ward distinguished the two cases on the grou that, in the Wrights' Ropes Case, a statutory right of appeal existed, and that therefor, the principle set out in that judgment had no application to mandamus, the remedy sought in the Pure Springs Case. But how can the curial power to review vary so widely between appeal and mandamus, when Thorson so expressly negatived the difference?" The fac that access is had to the court by way of an appeal from the assessmen and not on an application for certiorari or mandamus does not alter the nature of the court's duty of supervision on the principles to be applied." In other words, Thorson J would have voiced his famous statement on discretionary powers even had the case come to him on appeal. Consequently, it is held by the writer that there is no alte native but to conclude that, in fact, the Wrights' Ropes Case overrul the Pure Springs Case .

Poizer v. Ward was an application for mandamus to force the Manitoba Registrar of Companies to register a company under s. I29 of the Provincial Companies Act, which reads, "No co-operative corporation shall be created under this part without the appro-

val of the Registrar, nor shall any by-laws be filed in the office of the Provincial Secretary until he approves thereof, and a copy thereof has been filed with him." It was held that, even though the application and all the accompanying documents complied with the requirements of the statute, that the Registrar had an absolute discretion to refuse the application for incorporation. As has been seen, this case approved the restrictive statement of discretionat power enunciated in the Pure Springs Case.

Mr. Staney Edwards has characterized this case as a "writing of a blank check to an administrative official". He considers the case bad both on the authorities as well as on grounds of policy. On grounds of statutory interpretation, he thinks the court erred in view of the "powerfullarguments " advanced recently against the " literal rule" where the result is at variance with the result contemplated by the legislature. To support his view that the legislature couldn't have contemplated the grant of so wide and arbitrary a power, he cites the absence of statutory grounds on which the approval might be refused, the absence of procedural requirements for the consideration of applications, and the fact that the Registrar was only a minor official. Prof. Edwards also believed that the Wrights' Ropes Case overruled the Pure Springs Case, a result in which the writer concurs, although for different reasons that Mr. Edwards,(he merely asserts that the two cases dealt with the same section i.e. 6(2) of the Income War Tax Act) .

He next criticizes the case on grounds of policy, claiming that to support such a result on the merits, it would have to be shown that no improper or capricious principle had been applied, that the findings were based on substantial evidence, and that the applicants knew the case against them and had full opportunity to be heard, and fourthly, that the reasons for the decision should be stated. It is contended that none of the foregoing reasons comprise policy, but insofar as they are valid, are legal principles of natural justice. We shall review these requisites under "Natural Justice" and find that the authorities are conflicting in respect to all but the last requirement where they are unequivocal in holding that stated reasons are not a prerequisiste. Mr. Edwards concludes his review with the conclusion that the time has arrived to generally overhaul the methods of obtaining judicial review of administrative decisions, in the abandonment of the

concepts of "judicial" and "administrative" and the substitution of the straight doctrine of ultra vires. We have reviewed at length the reasons why this, although largely desirable, is theoretically impossible.

It is sufficient to turn to the remarkable curial antics exhibited in assessing the functions of the Wartime Rentals Administrator over a series of decisions, to be fully aroused to consternation over the direction or directions in which the law may "blow" in this field.

It will be recalled that the court in Re Brown and Brock v. Rentals Administrator (supra), unequivocally classified the functions of this worthy as " purely administrative" as a result of which the writ of certiorari was not available as a remedy. This was in 1945

In 1948, three years later, the Ontario Court of Appeal, being seized with a particularly meritorious set of facts, voiced the following, ' The Court of Rentals Appeals while not an inferior court in the strict sense of the word, was one which was required to discharge quasi-judicial functions, and was, therefor, amenable to review and control by this court, if it ventured beyond the jurisdiction vested in it." (Cox v. Villeman 1948 OWN 721). The body in question while an appeal tribunal, decided the same questions exactly as the Administrator in the Re Brown Case.

In 1949, we return to the Rentals Administrator in Re Chenoff v. Gleazer 1949 I DLR, and find that his functions have change considerably since 1945, as the court now states that he is a judicial tribunal. Consequently, the court's finding that Rental Orders (s.II of O 294 respecting service of appeals) had not been rigorously observed resulted in the declaration that the tribunal had acted completley without jurisdiction, and certiorari must go accordingly.

In a later case (I), the Quebec Superior Court reverted to Re Brown and Brock, holding that the Commissioner of Rentals for the Province of Quebec was acting administratiely in exempting a lease from the provisions of Rental Order O 753. And so the Comedy of Errors ended.

Finally, we need only mention Chartrand v Montreal 1943 Que.SC 329, where a tribunal found to have unlimited discretion"was held to be judicial, and R. v. Pantelidis 1934 I DLR 569. where a tri

bunal which had power to, and had in fact, imposed a three-month jail sentence on a Canadian citizen, was held to have been acting administratively, to realize the extent of the unpredictable, heterogeneous matrix of decisions which have arisen from the failure of the courts to address sound judicial principles or even common sense to this problem. Preoccupation with the traditional common law viewpoint toward individual rights and solicitude to remedy hard cases and check the bogey of " administrative lawlessness" had been responsible for the virtual abandonment of judicial principles, and reduced the law to a state of uncertainty that might be characterized as 'catch-as-catch-can". In R. v. Pantolidis, the decision that the tribunal was acting administratively appears to have been in no small measure dictated by the court's finding that there were no lawyers on the Board. At the risk of being both trite and presumptuous, one wonders whether there were any on the court!

THE PROBLEM AS STATUTARY INTERPRETATION

It has been suggested that the entire field of administrative law consists merely of a grouping of cases on the interpretation of statutes.(I) Mr. Edwards postulates that the tests of functions have "grown out of the history of the writs" and their chief effect seems to be confusion.(2) They obscure what should be the real question before the courts...wether the official has acted within the authority and in the way permitted by the statute."

Have the courts, then, by accepting the distinction between functions as the basis for the determination as to whether interference is orris not justified, merely indulged in philosophical abstractions? The reply is quite clearly that they have not. As we have seen, the determination that a tribunal acts judicially is a condition precedent to a finding that the tribunal is a "court" within the meaning of s.9(6 BNA. Again, the principle has been too often and too long enunciated that the prerogative writs lie only in respect to judicial proceedings.(3) If a court found that an administrative tribunal was exceeding or abusing its jurisdiction, and no statutory right of appeal lay to the court, by what machinery may the court impose upon the tribunal, its decision that it has been acting ultra vires? This position led to the evolution of the principle of "quasi-judicial"which has been the subject of so much comment in this paper. The enlargement of the scope of the prerogative writs would have to be the result of legislative action, a contingency which is most unlikely to occur, when one looks at the increasing tendency in statutes to abrogate completely the running of the writs, in respect to the subject-matter of the statute. In practice, the courts, of course, by their power to classify the function in the particular case, have practical carte blance to intervene at will and thus to directly affect the course of legislation.

If, however, it is not possible to treat judicial review of administrative decisions as pure statute interpretation,it will be appreciated that it is only from construnction of the governing statute that a court can infer the nature of the function in the

(I)Reid, Law Soc. Lectures I953. (2)supra (3) however, see post, under "Curial Machinery-Certiorari" for exceptions.

first place. Except for those cases which might more properly come under the heading "natural jusitce", the great majority of other cases of interference might be classified as straight " ultra vires" cases, the statute serving as the entire basis of adjudication. Even in a large number of "natural justice" cases, the statute of course plays an indispensable role; if a statute expressly dispenses with the necessity of a hearing, it is obviously futile to apply to a court on grounds of natural justice, that a hearing has been refused.

A court could examine a statute setting up a tribunal, and from the nature of the grant of power contained therein conclude that as no standard had been prescribed to govern the discretion or procedure of the tribunal, no standard existed to restrain or restrict the body by a court of law. No finding has been made here, as to the nature of the function of the tribunal. However, from the same reading of the statute, the court could pronounce that the function of the tribunal was " administrative" and consequently no power lay in the court to interfere. The end result is the same in both cases, and appears to justify those, like Mr. Edwards, that the assessment of the function is useless and meaningless, an archaicism derived from the history of the writs.

Having fixed, however inadequately, the place of statute interpretation in this field of law, let us examine the principles governing courts of law, in the actual construction of statutes setting up tribunals, that come before them for adjudication.

There are two main directions along which thinking may lie in respect to statute interpretation,(I) the "literal" meaning,and (2) the "intention of the legislature". If we examine the first we are immediately struck with the shortcomings of words as mathematical symbols, and are caught up in philosophical abstractions about the "meaning of meaning". "Even where careful use of them gives relative precision, the infinite variety of factual combinations is bound to cause doubt as to their meaning in relation to particular cases" (JA Corry) . MR Cohen in "Law and the Social Order" states "The meaning of a statute consists in the system of social consequences to which it leads or of the solutions to all the possible social questions that arise under it...the meaning of the statute is then, a judicial creatio

in the light of social demands."

On the other hand, it is said that legilatige intent is a myth, and that even Parliamentary majorities who run for the division bell have no common intent (or usually interest) , as to the varied complex provisions of the statute under debate. General "social purpose would appear to be the only real " legislative intent", where it is present at all.

The power of a judge to "legislate" in interpreting a statute, is,of course, in "determinate within determinate limits". No court will fly in the face of the clearest statutory provision. What could the court have done, for instance, in Capel v. Child had the statute, after enacting that the Bishop could act " on his own knowledge",further expressly enacted that a hearing was unnecessary?

It has been said that English judges have ever been hostile to legislation in that it constituted an impediment to their beloved "symmetry",inimical to the uniform development of the common law founded on custom and the reasoned popular assent over long periods of time. It has been suggested that this reasoning motivated the development of such doctrines that statutes must be construed liberally for the subject,(A/G v.Turner 1648) ; strictly where common law rights were prejudiced or new remedies introduced,(Pool v. Neale 1657). The automatic application of hard and fast tests made the search for legislative intent unnecessary. A strong presumption grew up against a statute ousting the jurisdiction of fht common law courts (e.g.R.v. Moreley 1760 2 Burr. 1041). The 17th and 18th. century concept of the separation of powers are responsible for such widely held judicial beliefs that the courts could void statutes, contrary to common sense. When the supremacy of Parliament was finally conceded, judges naturally returned to the literal interpreation rule, which resulted in Jones v. Smart, in a decision that a statute of Charles II qualified the sons of doctors but not the doctors themselves! To avoid such constructions, the "golden rule" was declared in 1829 in Warburton v.Loveland, by which literal meaning of words could be modified so as to avoid a result that the legislature could not have intended, and hence avoid the harshness of literal interpretation. After a protracted " battledor and shuttlecock" game, the courts seemed to come out clearly in favour of the literal interpretation rule, on the basis that the golden rule

by departing from the obvious meaning of the statute caused the courts "not to construe the act but to alter it."

The doctrine of literalness became more difficult of application when Parliament, abandoning the specific prolixity of I7th and I8th. century statutes, became more general in wording, The Court of Appeal reversed an order ruling absolute a habeas corpus. The House of Lords, despite the literal wording of s.I9 of the Judicature Act allowing and appeal from habeas corpus proceedings, inferred that the legislature had not intended to include the appeal in s.I9, thereby reversing centuries of solicitude for the personal liberyt of the subject.(Cox v.Hakes I890 I5 App Cases 494) . The same reasoning is clear in Ex Parte Jaffe I93I AC .The Patents Act of I888 authorized the Board of Trade to make rules to "have the same effect as if contained in this Act." By I93I, this power had been so sweepingly delegated in practice, that, finally , the courts in this case held that the words "the order...when made, shall have effect as if enacted in this Act" could not validate an order which the Minister was not specifically empowered to make by the Act itself. The court concluded that Parliament could not have intended such a widespread delegation of power in such a fundamental matter.

The degree to which statutes should receive strict construction is perhaps, the crux of the problem technically. The power of the courts to encroach upon the legislature is manifest in the power to give effect to the multiplicity of rules of construction extent."Whoever hath an absolute authority to interpret any written or spoken laws,it is he who is trule the law-giver to all intents and purposes, and not the person who first wrote or spoke them.' went Bishop Hoadley's sermon (quoted in Gray's nature and Sources of Law).

"Political liberty requires clear and exact definition of the offence. So also, the rule that statutes in derogation of common right are to be construed strictly has some excuse in England where there are no constitutional restrictions. There, it is really another form of Blackstone's tenth rule that interpretations which produce collaterally absurd or mischeivous consequences are to be avoided. In the United States, it means that interpretations which would make an act unconstitutional are to be avoided or else it is equivalent to Blackstone's tenth rule. Wherever it is applied beyond these limits,

it is without excuse and is merely an incident of the general attitude of courts towards legislation. The proposition that statutes in derogation of the common law are to be strictly construed has no such justification. It assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relatio n of private law can be anything but in derogation of the common law, the social reformer, the legal reformer, under this doctrine must always face the situation that the legislative act which represents the fruit of their labours will find no sympathy in those who apply it, will be construed strictly, and will be made to intdrfere with the status quo as little as possible."(Roscoe Pound, 2I Harv.Law Rev. 383).

Prof. Hohn Willis feels even more stronly about the "arbitrary"use of the weapons of interpretation by the courts. In I936 UTLJ he attacks the ancient canons of construction,"presumption of legislative intent", as being no longer employed to ascertain the intent of the legislature but to control it. Traditionally, the courts, in construing legislation which misht have the effect of barring the subject fro m the courts, presumed against such a reading because legislatures were not in the habit of doing so. He contends that this rule is arbitrary today, when administrative finality is a commonplace."If, in I937, a court resorts to these old presumptions, it is doing something very different from attempting to ascertain the probable intention of the legislature...English and Canadian judges have no power to declare acts unconsittutional merely because they depart from the good old ways of thought; they can, however, use the presumptions to mould legislative innovations into some accord with the old notions."

However, is the foregoing contention correct? It is suggested that it is not entirely so. The rules of statute interpretation, including presumptions against legislation depriving the subject of access to the courts, are set law. If judges do not make law, in theory, how can they change these old common law presumptions? The existence of these canons of construction are, or should be, the accepted standard against which the legislative draftsman must gauge the effect of his work. This contention was given judicial voice in Atlantic Coastline Railway v. Commonwealth 302 Ky.R., where the court

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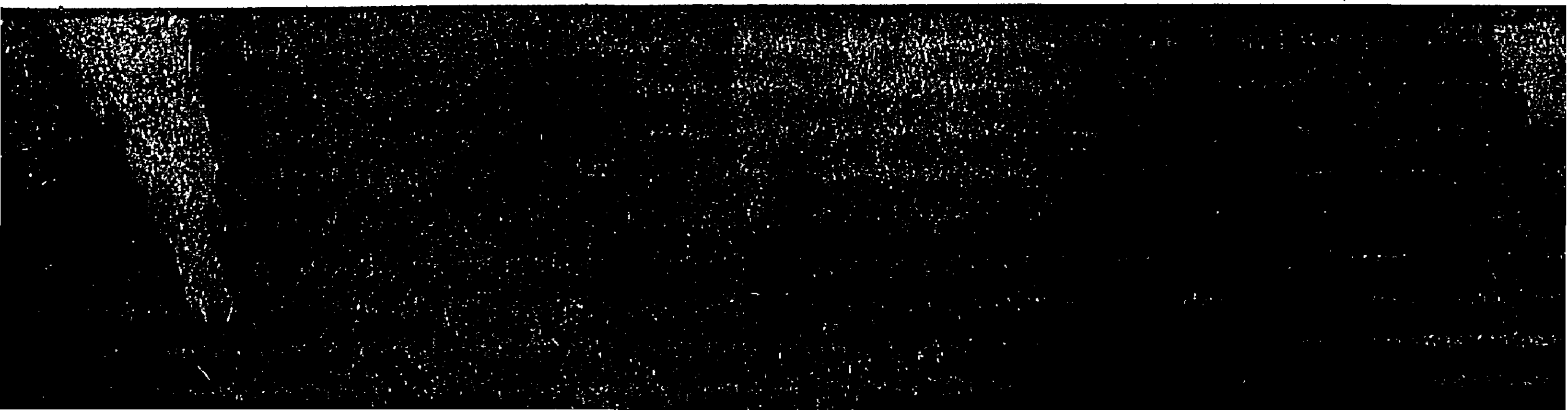

As JS Mill said,"numerous representative bodies ought not administer or dictate to those who have charge of administration." It seems anomalous that the Canadian legislature should vest administrative agencies with such wide discretionary powers, while, in the US, with its real separation of powers, legislatures should be so prolix in their instructions to legislative agencies. However, the problem of the draftsman is a real one in any jurisdiction. If a statute is prolix in ennumerating particulars, the courts take the view that to extend the particulars beyond those expressly set out, would be to legislate further."The imminence of an absurdity has power to limit words but not to extend them."(Corry). The further effect of prolixity , as we have seen, is to provide a more or less elaborate standard by which a court may review the findings of the tribunal, an effect that a legislature is usually at pains to avoid.

On the other hand,general wording is susceptible to the probability of unforesseable and uncertain curial interpretation, that might conceivably, deprive the statute of all real efficacy. Would a court, in amplifying general wording, or perhaps "particularizing" it to fit the caseat hand, leave itself open to charges that it was legislating? The Supreme Court of the United States has said "no"; but in a field where each case turns so peculiarly on its own facts, no one case can be general authority.

In conclusion, it may be stated that there is a certain basic acceptance of principles in the field of statute interpretation. If the meaning of the statute is "plain" ,theliteral rule will be applied; of course, many judges will agree that a passage is "plain" in meaning, and yet ascribe different "plain" meanings. In applying the goldenerule (I), the court must decide what constitutes an absurdity, and it will be readily appreciated that one judge's view of what constitutes absurdity may easily differ materially from that of another. Heydon's Rule (2) is perhaps the most ambiguous of all, and means going heind the act to find its true purpose and intent, a concept fraught with considerable hazard, and subject to the subjective interpollations of the judge's private opicnion.

(I)" If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."
(2)Heydon's Rule. "What was the common law before the act?2.what was the mischief and defect for which the [illegible]

When all is said and done, however, it is uncontestable that the courts, even with the absolute minimum of animosity toward legislation, are armed by the uncertainty of the basic premises of interpretive processes and the multiplicity of rules and canons available, to nullify by "judicial arbitrariness" seemingly, the most fortuitous and least innocuous statutes that come before them. Prof. Scott (I) was thinking of this perhaps when he voiced the complaint, "the balance between controlling excesses and abuses and taking part, even if a negative part, in the formation of public policy, is extremely delicate."

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the Parliament hath resolved and appointed to cure the disease of the Commonwealth. 4. The true reason of the remedy.
(I)1947 Can.Bar.Rev. 277.

THE CURIAL MACHINERY

I. Certorari

Appeal from an administrative decision must, of course, be expressly conferred by statute. In the absence of statutory appeal, review lies only through the medium of the prerogative writs.

That the prerogative remedies are restricted and unsatisfactory is today almost universally conceded, and the absence of suitable alternative expedients seems to have been largely reponsible for the extent to which the traditional use of the writs, especially certiorari and prohibition, have been contorted by the courts and rendered so uncertain in practice. The Committee on Ministers' Powers voiced this sentiment ,"Procedure by way of certiorari, prohibition, and mandamus is archaic and in some ways cumbrous and inelastic, and we could suggest the expediency of introducing cheaper and more expeditious procedure." This is all very well, but the only answer lies in legislative action, a most unlikely expedient when it is considered that the very setting up of administrative tribunals discloses legislative intent to exclude the jurisdiction of the courts.

Firstly, however, we must examine more closely the contention, almost universally held by juridical writers, and repeatedly avoued by courts, that certiorari (and prohibition) lie only in respect to judicial proceedings.

Prof. Willis takes it for granted (UTLJ '35-'36 p.62), "certiorari lies only in respect to judicial proceedings as distinguished from administrative acts; that is admitted." DM Gordon states," On principle, it seems impossible to justify the use of the common law certiorari for reviewing the exercise of administra tive functions. For, historically, certiorari is a remedy that rests upon the theory that all judicial power has been delegated by the King... and that he, as represented by the King's Bench, is calling his delegates to account for their use of their delegated powers; certiorari being the means by which he informs himself of what they have done."Again,"But, generally, administratige tribunals can seldom be said to act as the King's delegates.In general, the Crown does not possess and could not delegate such powers as statutes authorize administrative tribunals to exercise."

This proposition has received curial endorsement in

countless cases. Random examples are, Rv Coles 8 QB 75, R v. Salford Overseers 18 QB 854, R v.Aberdare Canal Co. 14 QB , R.v.Sunderland JJ 1901 2 KB 757, R v. Titmarch 32 OLR 569; "nothing but a judicial act will be removed by certiorari... " (R.v.Lediard 96 ER 784); R.v. Lloyd Cald. 309; "where the proceeding is not a judicial act, the court has no authority to grant a certiorari; Ex parte Jacob 10 NBT 153; Ex parte Taunton 1 DPC; R v. Simpson 1880 NBR 472. "Certiorari does not lie to bring up for review administrative acts but obly such as are judicial." per MacDonald CJ in In Re New Glasgow 1897 NSR 107.

The authority most repeated probably is Lord Atkin's famous dictum, where he referrs to bodies to whom certiorari will lie as "any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially." Although, as we know, this does not mean "pure judicial" bodies, but it has the effect of precluding "purely administrative" bodies.

In Re Brock v. Rentals Administrator 1945 OR 413 we have recent authority of the Ontario Court of Appeal for the ancient proposition, the court holding that, as the Rentals Administrator was acting "purely administratively", the prerogative writ of certiorari was not available as a remedy. We have further authority in Re Ness and Incorporated Racing Association 1946 3 DLR 91, where Hogg,J,stated "In order that certiorari may lie, the body whose acts are in question must have imposed upon it a duty to decide, as, for example, the duty cast upon the magistrate to grant or withhold a licence...where there is no such duty imposed by law upon a person, although matters which affect the rights of individuals may be the subject of adjudication, certiorari cannot be granted."

However, the proposition that certiorari lies only in respect to judicial proceedings has not gone unchallenged, both by the courts in practice amd more recently, by juridical writers.

In 1882, we find BrettLJ urging courts to employ freely the writ of prohibition to restrain inferior tribunals. "My view of the power of prohibition of the present day is that the court should not be chary of exercising it; and that wherever the legislature entrusts to any body of persons other than the Supreme Courts, the

power of imposing an obligation upon individuals, the courts ought to exercise as widely as possible the power of controlling those bodies of persons who attempt to exercise powers beyong those given them by Act of Parliament." (R.v. Local Government Board I0 QBD 309). Although the court here spoke of prohibition, the dictum is of course, equally applicable to certiorari, and has been cited by courts as authority for wide use of the latter remedy.

In R.v. Woodhouse I906 2 KB 50I ,we find Fletcher Moulton LJ stating,"..certiorari is frequently spoken of as applying to judicial acts only, but the cases by which the limitation is supposed to be establish show that the phrase " judicial act" must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial'."

Avory J,in R.v. Hendron, delivered dectum to the effect that the writs of certiorari and prohibition would lie in respect to "matters which are not perhaps strictly judicial".

As far back as I869, we find the Supreme Court of Nova Scotia stating,in Crawley v. Anderson I2 NSR 37, "The legislation and practice in this province, give a wider scope to the writ of certiorari than it has ever had in England. In R.v. Coles 8 QB 75, it was said that a certiorari does not lie to remove any other than judicial acts. This appears to be the English rule; we have not so restricted it in this province." The same court continued in I877 in In Re Assessment of the Bank of Nova Scotia by New Glasgow I877 2 NSR 32 " It (certiorari) is not so restricted in this province as not to remove any other than judicial acts."

It was broadly laid down in Duchess of Portland v Wynne 87 ER I308 and R.v.Inhabitants of Glamorganshire 9I ER I287, that,as a rule of general application in the Court of King's Bench,will examine the proceedings of all jurisdictions created by Act of Parliament This case was followed in I853 in New Brunswick in Ex parte Jocelyin I853 NBR 637.

In Local Government Board v Arlidge, the House of Lords seems to have assumed that certiorari was the proper remedy to review a purely administrative decision of the Board. In this case, however, the appropriateness of the writ had not been argued before the court.

In the Rice Case, certiorari was also assumed to be the proper remedy, although no express finding was made as to the nature of the Functions of the Board. A long line of English decisions, in fact, either granted certiorari or assumed it to be the proper remedy, without the court having made express findings as to the nature of the funcions, e.g. R.v.Arkwright 1848 12 QB 960, R v. Thornton 1898 1 QB 334, R.v. Groom 1901 2 KB 157, R.v.Richmond 1921 1 KB 248, R.v.Butt 1922 37 TLR 537, R.v. Shann 1910 2 KB 418. In the majority of the cited cases the tribunal whose decision was under review was in fact acting administratively. Refraining from making a finding as to the function would appear to be the most effective way of circumventing the question .

In John East Iron Works v. Labour Relations Board of Saskatchewan (cited post), certiorari was granted to quash certain orders of the Board, although no finding as to the function of that tribunal were made by the court. Here, however, the facts were somewhat unusual in that the Court of Appeal, upon hearing the appeal, implied that certiorari would lie. When the Privy Council returned the case to the Court of Appeal for a rehearing and the implied finding had not been disturbed, the Court of Appeal felt at liberty to proceed with that remedy, although, too, the Privy Couonil had made no finding as to the nature of the function. This case was followed in the same year in Capital Cab v. Canadian Brotherhood of Railway Employees, though, here again, no finding as to the function was ma de.

A very recent Canadian case reveals a startling willingness on the part of a Court of Appeal to expand its powers of review, almost in direct contravention of established judicial principle. Re Safeways Ltdl 1952 3 DLR 855 concerns a finding of law on a collateral issue, whifh was necessary to vest the Board with further jurisdiction in the matter, a finding as to whether certain persons were "employees" of the company in question. The court said," the court may review a decision of an administrative board on certiorari even where there is a legislative bar...and quash it if the Board has exceeded its jurisdiction consequent upon an error of law apparent on the face of the record." John East Iron Works was referred to, but as we have seen, the authority of doubtful value. The court seemed perfectly prepared to acknowledge the

fact that the Labour Relation Board was an administrative tribunal, and did not ev3n observe the amenities by stating that there was an obligation to proceed judicially.

Two American judicial writers of prominence who have closely observed both the American and English developments have the following comments. Prof. Schwartz in "Law and the Executive" concludes that today the writs will lie to review "practically all administrative determinations even where they are legislative in character, if there is a duty on the executive to decide in a 'judicial manner' ". Dickinson, in Administrative Justice and the Supremacy of Law" (I927 38) looks at the old common law requirement that certiorari must be addressed to an inferior tribunal,i.e. a body acting judicially in the strictest sense, and comments " ...following its usual process of growth by analogy, our law has begun with the fact that administrative tribunals are composed of public officers and has applied to them the rules governing court control of the acts of such officers." It is instructive to compare this view with that of Mr.Gordon,"....administrative tribunals can seldom be said to act as the King's delegates. In general, the Crown does not possess and could not delegate such powers as statutes authorize administrative tribunals to exercise."

There are, however, valid grounds for argument that "King's delegate" may be assimilated with "public officer" for the purpose of permitting judicial review. "King's delegate" is of course, an archaic term, and there is evidence that it was quite nebulous even in the days when it was extant. In the Middle Ages, manor court and county court together took care of the general business of the surrounding area, both administrative and judicial, a tradition that was later inheribted by sessions of the justices of the peace, which exercised concurrent jurisdictions in law and administration by virtue both of common law and statute."Their predominance in county government, once established, remained almost unchallenged until the second quarter of the I9th.Century, and, although it has since been gradually superseded, the principles on which they conducted local administration acquired a fixity which has enabled them to survive the transference of administrative functions to other bodies during the last one hundred years, and to serve as a basis for the modern method of judicial control."(Keir and Lawson "Cases on Constitutional Law

During the 18th.Century, there was very little central government interference in local affairs, and, if Parliament determined to interfere with private rights, it used the established and traditional medium of the justices of the peace. Thus, the justices were vested with straight administrative duties, to determine grants etc. as they saw fit, pursuant to the Poor Laws, the various licencing acts,etc. Although their functions were usually distinguishable, they were expected to decide all issues on certain fundamental principles of natural justice. It seems more natural to assume that reviewing courts would assimilate the functions performed, at least insofar as they required the application of old common law principles, when the administrative functions were gradually divested from the primarily judicial bodies and vested in statutory tribunals.

How,further, is Gordon's contention valid, that "..the Crown does not possess and could not delegate such powers as statutes authorize administrative tribunals to exercise." In the first place, the Crown, as distinct from the legislature, does not possess in most cases the power to exercise the authority which is conferred on these tribunals. The power is legislative. But, once the legislature has created these jurisdictions, the picture is somewhat different. In a majority of cases, the tribunals created by the legislature report to or are responsible to various Crown Departments. They are Crown servants or Crown officers in many cases; in any event, they may almost without exception, be feferred to as "public servants". As the public is essentially thr Crown, there could be small objection to assimilating "Crown officer" with "public officer". The case law alsmot invariably refers to " public servant or officer" rather than "Crown servant or officer", and there is no doubt that "public servant of officer"is a more comprehensive term. In Henley v. Mayor of Lyme I30 ER 495, the Chief Justice of England held," in my opinion every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer.." Stuart J. in Smith v Christie I920 3 WWR 585, stated "...certainly, if a subordinate appointee of the Minister of Agriculature is a public officer, it would be strange if the Minister himself should not be one." Pathmasters, County Crown attorneys, the mayor of a town, special constables, have been held to be "public officers".

However, it is not intended to labour the point. From a purely procedural point of view, there may well be grounds for argument that certiorari should lie to tribunals exercising pure administrative functions. Such a proposition should not be too startlingly unrealistic in view of the historical assimilation of functions, the nature of public servants and the obvious necessity of confining their activities within the limits defined by statute, and the inherent proliferation of common law principles in the light of changing conditions. In practice the courts achieve substantially the same end when they characterize a tribunal as "quasi-judicial". Were certiorar to lie to pure administrative tribunals on strict jurisdictional grounds, the courts would be absolved from the necessity of actin somewhat less tha n frankly in thus tacking hybrid labels on pure administrative boards to justify interference. The certainty that the remedy would lie to any body created by statute would nullify much of the precariousness now facing the prospective applicant. The proposition would have to be premised on the strictest construction affthe word "jurisdiction". The majority of these tribunals are responsible for the actual discharge of their duties, not to the courts of law, but to Crown Departments administering the act in question. As we have seen, the failure of the courts to confine their surveillance to questions of jurisdiction strictly understood, places them in the position of encroaching upon the legislative field.

When all is said and done, this proposition leaves one with more than a suspicion that expediency is the ruling consideration. It is significat that the courts themselves have generally eschewed such an application of their prerogative remedies.

The writs are admittedly uncertain and largely inadequate remedies. The answer would perhaps lie in the adoption of a Uniform Administrative Procedure Act, or even, as al last resort, of a system of "administrative courts" on the continental model.

2. Mandamus

Mandamus was held by early authority to lie only in respect to "ministerial" as opposed to "judicial" acts. "Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature and so cleare and spefific that no element of discretion is left in their performamce, but that as to all acts or duties necessarily calling for the exercise of jddgement and discretion on the part of the officer or body at whose hands their performance is required, mandamus will not lie."(E.Freund "Administrative Powers over Persons and Property, Chicago I928, 227).

The fallacies of the foregoing are expesed when one examines the cases where there is a duty (ministerial) to decide, but the decision is purely discretionary (administrative). We recall in K.v. Archbishop, where statute required the Archbishop to approve a licence before a lecturer could lawfully preach. The only ministerial element was that requiring the Archbishop to arrive at a decision, the decision itself being purely discretionary. We recall, too, that the essence of ministerial actions is that they are based on mandates or warrants ro serve as agents to give effect to decisions already arrived at, whether the decisions are administrative or judicial in nature. In the Arhc-bishop Case, the necessity to decide must precede the decision; in any event, it must generally be agreed that a statutary obligation to ar-rive at a decision is completely at variance with the accepted concept of ministerial functions.

In Reg. v. JJ of Montgomeryshire, there was no suggestion by the Court of Appeal that mandamus was not the correct remedy, altho-ugh he re we see the applicants querying the "reasonablenss" of the Rules of Practice of the Quarter Sessions. Not only were the JJ not required to hear an appeal beyond the period prescribed in the Rules, but they were expressly precluded from doing so. Had they waived their own rules in favour of hearing the appeal, this act would have been one involving the widest discretion.

In Cooper v. Wandsworth, the court expressly found that the district board were acting judicially, and granted a mandamus.

However, even if we do not insist on the technical definiðion of ministerial as contained in Freund's statement, and accord it the

meaning "unattended with the exercise of any degree of official judgement or element of discretion", we still run into difficulties. There are illustrated by cases where the tribunal charged with the necessity of making a decision has in fact, made a decision, but the applicant for mandamus contends that the tribunal acted upon "extraneous considerations" or " contrary to natural justice", and that, consequently, the decision was no decision at all. Although this argument has been conceded by the courts (e.g. Rice Case) , the process has been a thinly-disguised judicial fiction to correct abuses in harsh cases, and should give no support in logic to the contention that mandamus will only lie in cases where there is no element of discretion.

Prof. Finkleman contends that the tribunal must exercise some discretion in determining whether there was or was not jurisdiction lying either with itself or with a body on whose authority it is called on to act.

However indiscriminatingly the courts have bandied about the words "ministerial", "judicial" , "inferior", "administrative", etc, in dealing with mandamus cases, it is clear that the writ will lie when a duty exists upon a tribunal or one of its officers to act in a certain matter; (a) the least contentious case is where the duty is "ministerial" in the strictest sense, i.e. where the authority executes or gives effect to the decisions of a tribunal whether administrative or judicial; and (b) where there is aduty to make a decision, whether that decison is to be arrived at judicially or administratively. Under (b), the writ would lie, of course, only to force the making of the decision, although it could prescribe factors to be considered so as to give effect to natural justice, etc.

REVIEW' ONTHE MERITS'

I. Jurisdiction and "Jurisdictional Fact"

It must be made clear at the outset that only authbrity in legal theory for prerogative interference is jurisdictionali.e. for the purpose of correcting (I) excess of jurisdiction (exces de pouvoir), and (2) abuse of jurisdiction (abus de pouvoir). Consequently, it is erroneous, strictly speaking, to speak of "review on the merits", although a considerable number of text-writers have done so. A dmittedly the remarkable readiness of the courts to characterize the most heterogeneous factors under the heading "jurisdiction" has deprived the traditional limitation of any real significance in practice.

It is obvious that no inferior tribunal regardless of whether it is exercising judicial powers or powers delegated to it by Parliament, can be allowed to determine with finality the extent of its own jurisdiction. The result woubd be chaos. To apply the principle of extension to a reductio ad absurdum, a tribunal authorized to issue liquor licences cannot turn around and issue marriage licences.

"No tribunal if inferior jurisdiction",according to Farwell LJ, "can, by its own decison, finally decide on the question of the existence or extent of such jurisdiction; such a question is always subject to review by the High Court, which does not permit the inferior tribunal to usurp a jurisdiction which it does not possess whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise....for the existence of the limit (of jurisdiction) necessitates an authority to determine and enforce it; it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure....it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact."

This question of course, is of paramount importance in the United States where a fair chance must be given, where a constitutional issue is raised, to submit both law and fact to judicial review under danger of the administrative order failing as being contrary to the "due process" clause of the Constitution.

The problem in England was posed by Lord Esher MR in

1888 21 QBD 313, "When an inferior court or tribunal or body which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may, in effect, say that, if a certain state of facts exist and it is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned and it will be held that they acted without jurisdiction. But, there is another state of facts which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction or finding that it does, exist, to proceed further or do something more."

It must be remembered, of course, that there are no constitutional restrictions on Parliament to prevent it from decreeing that the tribunal's findings on questions of jurisdictional fact or even of law alone, shall be final.

The English 1936 Housing Act empowered the local authorities to expropriate land subject to a prohibition that the land did not, inter alia, form part of a park or pleasure ground. The Ripon local authority found as a fact that the land in question was not a park and the Minister confirmed the compulsory purchasing order. Landowners appealed. "Where there is evidence upon which the Minister could arrive at the conclusion at which he did arrive, it is not for the Appeal Court to allow the appeal by rehearing the case and hearing evidence and considering evidence, and disagreeing with the conclusion of the Minister. It is a finding of fact and by a finding of fact I am bound." (Re Ripon Housing Order 1939 I All ER 508) . This is an admirable general statement of the law on the finality of administrative fact-finding. However, this was a case of "jurisdictional fact", i.e. a finding had to be made on a preliminary fact or set of facts to found jurisdiction in the body for the major adjudication. Consequently, the above decision was subsequently overruled. A finding of fact as to whether the land was a park or not had to be made as a condition precedent to the exercise of the tribunal's statu-

tory powers of expropriation. And the court of last resort found that the tribunal had to ascertain the preliminary fact correctly, under penalty of loss of subsequent jurisdiction.

In the United States a parallel decision is Crowell v Benson. The tribunal set up under the Harbour Workers' Compensation Act had to make a prliminary finding as to whether a "master-servant" relationship existed in the case before them, so as to determine whether the act in question became operative. The Court categorized this finding as one of "jurisdictional fact" and ruled that the tribunal's incorrect finding on the point had deprived it of all subsequent jurisdiction. However, the US Supreme Court took a different view in National Labour Relation Board v. Hearst Publications. The NLRA called for administrative determination as to whether an "employer-employee" relationship existed before the act became applicable. The court, in this case, held that the decision was merely one of "administrative fact-finding". This decision is of course, open to doubt, as the finding required the application of the facts found to the legal concept of the relationship.

A very recent Canadian decision is in point. In Re Safeways Ltd. 1952 3 DLR 855, the court stated "Before determining whether a unit is appropriate for collective bargaining, the Board must necessarily reach conclusions which are conditions precedent to its jurisdiction to make the decision. The question before the Board was 'is the unit seeking classification composed in whole or in part of employees within the scope of the Act?" In this case, the court erred in law in the interpretation placed on "employee", and,"in so doing, exceeded its jurisdiction; thereore, it is without jurisdiction to certify the unit in question. "Further, when an error in law exists in a collateral issue, the court will review the record on certiorari to see if it shows a wrongful usurpation of jurisdiction or if the Board acted in excess of jurisdiction." The exception taken to this case previously, was on procedural gounds.

2. Findings of Fact

Subject to "jurisdictional fact" discussed above, is it correct to state as a general rule, that administrative findings of fact are final?

Firstly, administrative tribunals are usually composed of experts in respect to the subject-matter with which they have to deal. "The decision, for instance, of the New York Public Seevice Commission that a gas company ought to provide gas service for a givdn district is almost inevitably more right than a decision by the courts in a similar case." (Laski; "A Grammar of Politics" 4th.ed. 393).

In line with this view, the courts tend to apply the traditional judicial concept that the court of first instance is always in a preferred position to ascertain the facts, being able to watch the demeanour of witnesses, hear on-the-spont argument, balance nuances of cross-examination, have the right to view, etc. The Committee on Ministers' P owers went on record, " we are of the opinion that there should be an absolute and universal right of appeal to the High Court on any point of law from the judicial decision of a Minister of Mimisterial tribunal, but we are satisfied that there should, as a rule, be no appeal to any court of law on issues of fact."

However, what is the curial view with respect to administrative fact-finding if it is found that the tribunal made the finding under review against the evidence on the record, or even without consulting evidence at all, or, if, having evidence before them, they made a finding of fact, not upon that evidence but upon completely extraneous considerations?

It has been asserted that an absolute unfettered discretion in administrative agencies in respect to finding s of fact, would be tantamount to nullification of judicial review. A court must be able to review administrative decisions to ascertain whether there was <u>any</u> evidence to support the finding of fact. The review should not, of course, go to the <u>wight</u> of evidence, but should be limited to "such relevant evidence as a reasonable mind might accept as adequate to support a conelusion."(Consol. Exison Co. v. NLRB 309 US I97).

On the other hand, is the argument advanced throughout this

paper that pure administrative decisions are reviewable solely on grounds of jurisdiction strictly construed, and that any other claim to review is an unwarranted intrusion on legislative sphere, this assuming the remedy is available.

To complicate the issue, there is not , of course, any hard and fast "law-fact classifications" in the great majority of cases. They are seldom mutually exclusive. Here again we find a virtual carte blanche for curial interference, similar to that which has plagued us throughout in respect to the distinction between judicial and administrative; "if the case, in the merits and equities is a good one, and the court feels interference is warranted then the issue before it becomes one of law; if not, the issue is one of fact and review will not lie."

Prof. Schwartz states that the distinction between law and fact furnishes the only guide to construct a proper theory of review. As we have seen, the British concept of review is based rather on the distinction between the nature of functions. In either cse, we are confronted with the existence of a vast, indefinable, twilight zone, where law, facts, and functions refuse to conform to defining principles. The "law and fact" theory comes up against "mixed law and fact" questions, and the distinction between "ultimate facts" and "evidentiary facts" . The "nature of the function" theory mires down in quasi-judicial hybrids. In either case, the indefiniteness of the concept leads to situations where the court can interfere at will, to the ultimate prejudice of the applicant and the will of the legislature.

Scrutton LJ observed, "In my view, it is impossible to reconcile the various statements of high authority on the division between fact which is unappealable and law which is appeallable."

Statute can, of course, make an issue one of law or fact which would ordinarily be considered one of the nature of the function. For example, under the UK Income Tax Act, the Special Commissioners found that a certain Railway clerk was the "holder of a public office or employment of profit of a public nature." for purposes of assessment. The Act provided for appeal on questions of law. The court held the decision of the Commissioners to be one of law, permitting curial interference. In the absence of statutory provisions respecting appeal

the court would have been thrown back upon the equally lugubrious task of determining whether the Commissioners had been acting judicially or administratively. (GWR v Bater I922 2 AC I).

Under the Income Tax A ct, was a finding that a yaxpayer was a "resident" a finding of law or fact? A majority of the House of Lords called it " fact". In the absence of the statutory right of appeal in "cases of law", the court wouold probably have decided that the Commissioners were acting "administratively". Of course, had the Commissioners previously been held by a competent Court of law to have acted "judicially" or "quasi-judicially", there would exist a judicial compulsion to adhere to the precedent, and to that extent it is not open to us to assimilate the nature of the court's functions in that behlaf too closely with a statutory right of appeal.

Where there has been a complete absence of evidence to serve as the basis for the administrative finding of fact, the courts have been quick to declare that the tribunal in question has been acting beyond it s competence. Whether an administrative finding of fact has been made without evidence is considered to be a question of law, and so reviewable on appeal. "To come to a conclusion which there is no evidence to support is to make an error in law."per DuParqu J. "Administrative determination of questions of pure fact are not to be disturbed any more than are the findings of a jury, unless it should appear that there eas no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come; and this, even though the court of review could on the evidence, have come to a conclusion entirely different from theirs."(GWR v Bater). "If there is evidence on which the local authority and the Minister can act, it is not for this court to say that they sould have come to a different conclusion from that to which they did come, or that they were wrong in arriving at decisions at which they arrived" (In Re Bambridge I939 I KB 500).

Is a finding of fact involved in a decision that houses occupied by certain chauffers were houses "intended to be used as dwellings for the working classes" within the meaning of the Housing and Town Planning Act of I909? The Court of Appeal said it was, Lord Reading stating,"... a chauffeur is, in my opinion, a member of the working classes, applying the ordinary test, and interpreting the

the words "working classes" in the ordinary and popular sense."

Again, of course, the statute governs. It for example, it explicitely vests the tribunal with the power to finally decide the issue on the basis of its own knowledge, or in the light of its own experience, there is the strongest room for argument that the legislature intended to avoid the necessity of a finding based on the relationship as legally defined by the courts. On the other hand, a mere injunction to the tribunal to determine whether a " master-servant"relationship existed, there is reasonable grounds to hold that the issue is one of law,i.e. that the finding on the particular facts must be consonant with the relationship as defined under analogous circumstances. by courts of law. On the other hand, a concept like "working classes" is a creature of popular usage, and although an administrative decision might run counter to popular denotations of the concept, there would be little chance of violence being done to established judicial principles, as would be the case where the finding related to a relationship like "master-servant." In other words, the issue is one of fact. If the tribunal held a doctor or lawyer to be a member of the "working classes", complaint would needs be addressed to the reviewing court on grounds of unreasonableness, not error of law, which would be the satated grounds if "master-servant" were involved.

Most cases, however, involve review of decisions based on or pertaining to both law and fact, and it is obvious that the peremptory label "law"or "fact" should be avoided by the courts in the first instance. By adopting a " mixed law and fact" attitude, more latitude is left to the court to sit back and honestly ponder whether the particular element of "law" or " fact" which is material to the issue at bar, is applicable under the pecular circumstances. For instance, a finding that the decision of an administrative tribunal as to the relationship of say, employer and employee is one of mexed law and fact, leaves the court open to consider the applicable material element in the comcept on another occasion at variance with that adopted in respect to the case at bar, without doing violence to principle. " Every case must be considered in the light of its own facts, but in the present case, I am of the opinion that these buildings come under the word "houses" (In Re Butler) .

3. Error of Law

Error of law by an administrative tribunal usually takes the form of a misinterpretation of the effects of provisions of the governing statute, which, according to the reviewing court, leads to wrong considerations being taken into account by the tribunal in rendering decision.

We recall, for instance, the case of Reg. v. Sylvester, where statute restricted the discretion of the tribunal to the qualifications of the applicants i.e. whether they were real residents and rate-payers, and where they were refused a certificate on grounds that there were too many alehouses in the vicinity, the finding was held to be based on wrong considerations, or error of law in interpreting their statutory discretion.

We recall, too the case of Reg. v. Boteler, where the tribunal which was authorized to issue warrants if they should "see fit", refused to do so, purporting to rest the exercise of their discretion on the grounds that the entire governing sta tute was unjust and unreasonable. The court said,"That is not a tenable ground on which this court can allow magistrated to decl9ne to exercise their jurisdiction according to law."

Perhaps the most famous case we have considered in thisrespect was Board of Education v. Rice.." A discretion to say whether the sums provided are fit and proper on the assumption that the Act allows the authority to prefer provided to non-provided schools as such is entirely different from a discretion, say, whether they are fit and proper when such preference is unlawful."

The effect of R.v. Mayor of Newcastle on Tyne I899 60LTR 963 and R.v.Ormesby Local Board I9I0 2 KB I65 are identical. The tribunals both misconstrued the statute under which they were authorized to act, and did, in fact, act upon principles and considerations not authorized by the sta tute. The courts, accordingly ruled that they ahad not in fact exercised their discretion at all.

The difficulties in ascertaining error of law in administrative tribunals is manifest. A court of justice must decide the actual issue before it and nothing else. A court of justice ,also, gives or mya be required to give, reasons for judgement, so that it may be ascertained at a glance exactly what considerations went to arriving at the ration

decidendi. Administrative tribunals usually keep very scanty records and it has been advanced that this consideration alone makes the remedy of certiorari singularly inappropriate to review purely administrative decisions. That this materially handicaps a court in endeavouring to ascertain whether error of law exists is certainly true, particularly when leading authorities (e.g. R.v.Nat Bell Liquors, 1922 2 AC 128) have held that affidavit evidence is inadmissable to show error of law. It is perhaps incorrect to pose this consideration as a practical argument against the use of certiorari to review administrative decisions generally, as technically the remedy is available only to review questions of jurisdcition, upon which the record is immaterial. It has always apparently been held that a High Court can question any decision in respect either to law or fact, only insofar as error therein is deemded to depreive the tribunal of jurisdiction. However, dicta in the very recent case of Re Safeways appears to cast some doubt even on this staunch old proposition.

The Committee on Ministers' Powers have recommended that any party affected by a decision should be given reasons therefor, and it has been contended that such a procedure would make for regularity of policy and ensure that the policy would be made clear to the public. Such a procedure would no doubt be required by any Uniform Procedure Act that may be adopted.

It is a principle then, that even a pure administrative body when required to render a decision, must in fact, decide that very issue and no other. It is a question turning on the facts of the particular case, of course, as to whether consideration of "extraneous matters" constitutes failure to deal with the particular issue before it, so as to depreive the tribunal of jurisdiction. There is an anomaly involved of course. A tribunal of a purely administrative nature is called upon to decide an issue on the basis of policy and expediency. However, a reviewing court may pick on some factor falling within the head of policy and expediency, and state that that factor was one that should not have been considered, I.e. was " extraneous", and , consequently hold that the tribunal had not arrived at a decision at all. In the event, a court may wind up ruling on what policy and expediency is in

respect to that issue, and thus leave itself open to charges of interference with legislative discretion. ... Though the state of the law may be a factor in policy it can never be the governing factor; otherwise, policy and exediency cease to have meaning and are onl other names for justice....whichever way the High Court rules, on a point of substantive law, this ruling can nevery determine whether an administrative order is wrong or right. Indeed such an order is never right or wrong, correct or incorrect." (Gordon p.426). He states further, "...the court's questioning the order of say, a licencing tribunal, because that tribunal was mistaken it its conception of the law, is no more justified than the court's questioning a municipal by-law or and order-in-council on the ground that the aldermen or the Privy Council would not have legislated if they had had a sounder knowledge of law." An applicant may be disappointed but not injured by an administrative decision. This proposition is rather too broadly stated. We rememeber the St. Pancras Vestry Case, for instance, where the desire and intent of the Vestry was defeated because they misread the governing statute as meaning 'whole pension or none at all". The court, in correcting their view of the statute, made it possible for th Vestry to review ther previous decision and render the decision which they would, in fact, have given had they interpreted the statute correctly.

That a court will interfere if there is an error of law apparent on the face of the record, is now settled law in most Canadian jurisdictions; The principle was thus unequivocally enunciated by the Sask. Court of Appeal in I949 in the John East Iron Case. The same result was apparent in Ontario in I952 in Re Safeways, where the tribunal under review was held to be purely administrative. "When an error of law in a collateral isse is evident, the court will review the record on certiorari, to see if it shows a wrongful usurpation of jurisdiction, or if error of law appears on the face of the record." We have evidence that the court will interfere even if the Board is purelly administrative, and ieven if the error of law does not go to jurisdiction.,... note that the court says, ".....a wrongful usurpation of jurisdiction, or if error of law appears on the face of the record."

Thus, again, has the "thin edge of the wedge"been broadened. Thus, does a tribunal, experts chosen because of special knowledge of fact involved, find themselves under a compulsion to virtually observe an administrative "stare decisis." Not only that, but the power of the court to classify law and fact, gives it, in substance,the power to review what may really be issues of fact, and to substitute judicial interpretations and concepts wholesale for interpretations and concepts that the legislature intended to lie strictly within the province of its legislative agency. If legislatures have the upper hand, the courts have the last word.(I).

On the other hand, there is evidence, despite the sweeping dictum in Re Safeways, that courts will exercise powers of review respecting error of law only in relation to what amounts in essence to what has been previously described as "jurisdictional fact." The great majority of recent Canadian decisions seems to bear this out.

(I) Paraphrased from Prof.Scott,"Administrative Law" '47 Anniv. Bar,Rev. p.27I.

NATURAL JUSTICE

I. Right to a Hearing

The maxim "audi alteram partem" (hear the other side), has been zealously safequarded by the courts, and , as we have seen, from the cases, affords the most consistent factor in the development of the law on the judicial intervention in administrative proceedings.

The basic requirement was enunciated in I723 By Mr, J. Fortescue in Dr. Bentley's Case. In Capel v Child, we saw mandamus issue to the Bishop to "adopt the requisite means (a hearing) for dulty informing his conscience." In Bonaker v Evans, we found the court stating, ".. the Bishop ought to have given the incumbent an opportunity to be heard before it (sequestration) was issued; for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless, indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary " In Cooper v Wandsworth, the court held that the local Board couldn't tear down old Cooper's house, acceding to plaintiff's submission "regarding the sound and universally applicable principle of natural justice, that no man shall be condemned either in person or in property without having had an opportunity of being heard in his own defence "

In I9II, Lord Loreburn voiced the famous dectum in the Rice Case."I need not add that in doing iether they (the admin. board), must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

In the famous Arlidge Case in I9I5, we found the court stating that the local government board,in hearing an appeal "must deal with the question...without bias, and they must give to each of the parties the opportunity of adequately presenting the case made." The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty is to mete out justice."

In Milk Marketing Board Case, we found the court ruling that the Board acted without jurisdiction in that it had not granted a fair hearing insofar as the applicant having arrived late, the preceeding proceedings had not been explained to him.

In view of the clearly enunciated principle developed above it is difficult to understand the reasoning of the trial court and the

Court of Appeal in the recent case of Russell v. Duke of Norfolk 64 TLR 263. The Jockey Club issued licences to race-horse trainers subject to the condition contained in the club rules that it might be withdrawn by the club on the grounds of gross negligence on the absolute discretion of the club. A trainer, Mr. Russell, had his licer withdrawn by the club, and applied to the court on grounds that the procedure adopted by the stewards constituted a breach of natural justive.

The reasoning of the court of first instance became inextricably wound up in contract. They looked at the rules of the club, i.e. the contract between the club and Mr. Russell, and could see no reason therein why a hearing should be required. "I cannot imply a condition" said the court "merely because it would be a reasonable condition." Lord Goddard, in discussing "natural justice", quoted the judgement in MacLean v. Workers' Union to the effect that, if a trade union or other vocational body had a clearly expressed rule whereby a member might be expelled without being called upon to explain his conduct, the courts would not interfere on grounds of public policy. "...if there was no contractual duty to hold an inquiry, there could be no breach of contract no matter how the inquiry might be conducted. The issue of natrual justicecan only arise in such a case if the rules provide that expulsion from a society or the withdrawal of a licence must be preceded by an inquiry or, if statute obliges a professional or other domestic tribunal to make due inquiry."

The Court of Appeal concurred by necessary implication, with the decision of the court of first instance .They stated that the rules of the club read as a whole, do require the club authorities to hold an enquiry conforming to the principles of natural justife, but that an enquiry had taken place, and that the stewards had not transgressed natural justice. "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter under consideration, etc. Accordingly, I do not derive much assistance from the defintions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is , that the person concerned, shoul have a reasonable opportunity of presenting his case."

Dr. Robson is unreservedly of the opinion that the Court of Appeal rested their decision squarely on the grounds indicated by the court of first instance, i.e. that the only duty to observe the rules of natural justice is dounded on contract. There is certainly support for this argument in that the Court of Appeal looked to the provisions fo the rules and found that an inquiry was in fact required. Would it be correct, then, to say that if they were prepared to rest their decision on grounds of contravention of natural justice, it would have been a waste of time to have read the rules and made an express finding as to the requirement for an enquiry therein? In view of the remarks of LJ Tucker quoted above, I do not think the latter proposition valid, but it would be pure speculation to assume that the Court of Appeal would have implied the necessity of a hearing in the absence of a statutory requirement. It is unfortunate that the point was not incontrovertably brought out because it leaves the law of England in some doubt as to the nature and extent of natural justice, and certainly gives credence to those who adopt Dr. Robson's observation arising from this case." The notion that a man is entitled to be dealt with fairly only if he has a formal agreement to that effect makes nonesense of the conception that there is something so natural or inevitable to a modern Englishman about these elementary rules of justice that the courts will insist upon their observance in all circumstances."

Tucker LJ's statment above-quoted is unfortunate according to Dr. Robson, in that it derogates from the clear precise and workable definition of "natural justice" substituting sojething therefor with no precise, uniform or special meaning.

If this restricted view of natural justice is correct, there is every evidence that it is not the law in Ontario.

2. S ufficiency of Evidence

In Allcroft v London we found the court stating ",,,..then it was contended that there was something he had considered which he ought not to have considered and something which he had not considered which he ought to have considered, etc. It seems to me that this is equivalent to saying that his opinion can be reviewed; if a man is to form an opinion...he must form it himself on such reasons and grounds as seem good to him."

In the Raven Case, we recall, a licence renewal was refused on the grounds that there were too many public houses in the neighbourhood when the statute, according to the court, required grounds personal to the applicant. The majority of the court held that there must be some grounds evident as to the paritcular public house before the justices could properly act.

In Wilso n v. Nanaimo Rlwy., even where the tribunal refused to permit an adjournment to prepare evidence, and the calling and cross-examination of witnesses, the court still refused to interfere on the grounds that the statutoty requirement of " reasonable proof" was one that rested with the discretion of the Lieutenant Governor in Council. The court would not have been satisfied with the adequacy of the evidence that was produced in fact, but there was some evidence before the tribunal, and the court would not interfere.

However, we have seen strong evidence of a judicial change of heart in the Wrights' Ropes Case, where the court stated " as the Inspector's report was not produced and there was no further evidence on the record to provide a basis for the determination of what would be a ' reasonable or normal expense" , the question had not, in fact, been determined by the Minister....It is not for the court to weigh the reasons, but we are entitled to know what they are, so that they may be adjudicated upon as to whether or not they are based on sound and fundamental principles." This decision seems to imply that an administrative tribunal should be required to maintain records of the evidence and findings leading to the decision, an obviously indefensible proposition.

Most recent Canadian decisions dealing with the point concern judicial or quasi-judicial tribunals, even though the particular tribunal had previously been characterized as administrative by other Canadian jurisdictions. e.g. Sisters of Charity v LRB of Sask. 1951

3 DLR 735.

There is strong dicta in the 1952 case of Re Safeways, that if there was some evidence before the tribunal in debating whether a person was an "employee" under the Act, the court would not interfere. The point is of special interest here, in view of the finding that the tribunal was administrative. This dictum was adopted by the Saskatchewan Court of Appeal in FW Woolworth Co.v Sask. Joint Board 1953 4 WWR 208, where an order of the LRB declaring employers of the applicant company to be an appropriate bargaining unit was attacked on certiorari on the grounds that the respondent (union) was not a trade union within the meaning of the Act. "Since there was some evidence before the board to support the order, the board had not exceeded its jurisdiction and therefore certiorari did not lie. In support of the applications cards purporting to be signed by twelve of seventeen employees were accepted as evidence with no proof of signatures thereto. Although the court pointed out that it would be advisable for the Board to adhere to the proper rules of evidence, it was not prepared t o hold that the Board couldn't under its own rules, accept such cards in evidence as it did." There is no finding as to the nature of the function, although of course, similar tribunals had been held to be administrative in other Canadian jurisdictions.

3. Showing of Reasons

A contention of the applicant in the Arlidge Case was that he was entitled to see the report of the inspector. On this ground, he failed, the court stating that a right to see the report made to the Board for its own use by its inspector would impair the efficiency of the inspectors and tend to limit the usefulness of the report.

The same law was applied in Ontario in the Advance Glass Case. The Combines Commissioner refused to produce the record of the private investigation upon the hearing.at which, by s.13 of the Combines Act, the parties were to be given a "full opportunity to be heard" . Even a statutory provision in these terms was deemed insufficient to require production of the record.

Both Toronto v Jockey Club 1950 OR 571 and Toronto Newspaper and Globe Printing Case appear to be authorities for the contention that if failure to produce records or reasons amounted to substantial denial of natural justice, the courts would interfere.

A case where production was actually ordered is Cresswell v Etobicoke Conservation Authority I95I OR I97, although this is weak authority, production being required by s.20(4) of the Ontario Conservation Authority Act.

Mr. Reid of the Osgoode Hall staff states that the decisions go both ways on this point, but quotes none were a court required production either of reports or reasons on grounds of natural justice alone, particularly where the tribunal was administrative. However, in view of Dicta in Tor.v.Jockey Club and Tor. Newspapers, there is a probability that the court would interefere in a strong case.

4. Cross-examination

The Rice Case would appear to be authority for the contention that the right to cross-examination is an inherent part of a fair hearing. The court, it will be remembered, stated, "the tribunal could obtain information in any way thry thought best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." The Arlidge Case adopted this view. However, although the principles enunciated in these case are always present in the background, there is evidence that the view stated therein in respect to cross-examination have been of desultory application.

In the Wilson v Nanaimo Rlwy. Case, despite a finding that the tribunal was under a compulsion to act judicially, the tribunal's decision on "reasonable proof" was held to be final, that it could properly admit hearsay evidence, and that there was no obligation to permit cross-examination. It was also found that the parties had had ample opportunity to adduce evidence. The decision is not clear for two reasons; (I) the question would appear to be open as to whether the court would have acceded to a contention that cross-examination had not been allowed, if there had not been an opportunity to adduce evidence in chief; and, (2) as mentioned previously, it is uncertain as to what extent the court was influenced by the fact that the case involved a direct executive decision, the L/G in Council.

However, a recent case affords more positive authority that failure to allow cross-examination is fatal where the tribunal has been acting judicially or quasi-judicially. The case, Re Toronto Newspaper Guild and Globe Printing Co I95I 3 DLR I62, concerned an

application by certiorari by the company to quash the bargaining certificate granted to the union by the Ontario Labour Relations Board, the Board having refused to reconsider or take any action as required by s.5 of the Act. The court considered the question to be whether the hearing was so deficient as to represent a negation of justice, or, if the hearing was adequate as such, whether the company was given fair opportunity of presenting its side of the matter or contesting the case put forward by the union. This point seems to clarify our first query on the Wilson Case, at least in respect to the law in Ontario today.

After referring to the Arlidge Case, the court was of the opinion that the company was not given an opportunity of presenting its side of the case or of answering the union's case, and the refusal of permission to cross-examine among other things, constituted a breach of the fundamental rule that any person in a judicial or quasi-judicial proceeding was to have the right to be heard. Referring to the Rice Case, the court held that the Board had " offended the principles of justice' by declining to permit the company to adduce evidence in the form of cross-examination, and by denying it the right to examine the documents filed by the union.

The extent to which the distinction between judicial and administrative functions is material again appears to be in some doubt. For example, let us look at St. John v Fraser 1935 SCR 441. An investigator appointed under the BC Securities Act was authorized to investigate the conduct of a certain company, the issue and sale of its stock being the principal subject of enquiry. Plaintiff St. John was a shareholder in and business manager of, the other plaintiff a company which had underwritten the issue. He was examined by the investigator, and both solicitors and counsel for the plaintiffs took part in the investi ation. They tried to restrain the investigator from proceeding on the ground that he had not given them notive of examination of witnesses as to their relations with the company under investigation, and had not given them the opportunity of cross-examing these witnesses. Per Cannon J., Crockett and Lamont JJ concurring, "whether the affording to all persons, whose status and reputation may be affected, of the opportunity to cross-examine any and every wetness brought before the investigator is such an essential requirement as goes to the investigator's jurisdiction depends on the nature and pur-

pose of the investigation as evidenced by the provisions of the entire statute." Here, the investigator was acting in an intermediate capacity and so administratively, and finally the statute itself was conclusive, IO(4), reading, " Disclosure by any person other than the A/G, his representative or the registrar, without the consent of any one of them, of any information or evidence obtained or the name of any witness examined...shall constitute an offence."

It is doubtful whether it could be concluded from this case that the courts are particularly disinclined to review this question when the tribunal is administrative. In this case, the court found the tribunal to be administrative but under a compulsion to act judicially, i.e. in the sense that it must act fairly and impartially, so that the case turned strictly on its own facts, particularly, of course, the effect of the statute.

Courts have been loathe to interfere, on the same principles set out in the St. Hohn Case, where investigations by the Combines Investigator is concerned. However, the effect of Imperial Tobacco Co v McGregor I939 OR 627, is somewhat uncertain. It was alleged on certiorari, inter alia, that cross-examination had bot been permitted on the enquiry. Hogg JA held that the motion should be dismissed as the Commissioner was acting administratively and not judicially, the proceedings being of an interim nature. However, he was bound to act judicially, i.e. fairly and impartially. Substantial justice had been done in this case, though the parties having had "ample time and full opportunity to present their case, and to meet all allegations against them." Riddell JA held that failure to object to the investigation at the time constituted a waiver. One thing seems clear from the case, i.e. that if failure to allow cross-examination should constitute denial of natural justice, the court would not be loathe to interfere, despite Fisher JA "The Commissioner's duties were administrative and the court could not grant the order asked for and therefor destroy the peculiar benefits and advantages of administrative enquiry."

Of course, where the function has been characterized as judixial, and failure to allow cross-examination has amounted to denial of natural justice, or a presumption of substantial prejudice to the applicant is present, the courts have been vehement in condemning the injustice and expeditious in granting remedy. On an investigation by the Superintendent of Insurance of a complaint made under the Ontario

Insurance Act, that discriminatory rates were being charged by a certain company for car coverage, he examined the witnesses but refused to permit counsel for the company to cross-examine them. The court said, on an appeal under the Act ".....his conduct violated every principle of fair play, and of natural justicell...it will be intolerable if any one on such a farcical investigation could be allowed to determine the rights of any one."(Re General Accident Co. of Candda I926 2 DLR 390.

It would be a fair conclusion that the law in Ontario is that failure to allow cross-examination will be fatal if it constitutes a substantial denial of justice, where the tribunal acted judicially or quasi-judicially. However, as has been repeated, the distinction between functions would have little significane in practice because of the readiness of the court to impose the duty to act judicially where the peculiar merits of the case demand it, regardless of the real function.

CONCLUSION

Is judicial review of administrative adjudication on the increase or the decline?

Many English juridical authorities take the view that it is on the decline. The Robinson Case is taken as indicative of the trend. The basis for this outlook is primarily historical. Until late in the 19th. Century, Ministers' powers were checked by a jealous Parliament, and most of their powers were derived from the prerogative. "The radical reforms of the Liberal Government of 1906; the unforeseen cataclysm of World War I; the General Strike of 1926; the prolongued depression with its vast burden of mass unemployment; the economic crisis of 1931; the widening of the franchise and the popular demand for new and better social services; the outbbreak of the Second World War, waged in terms of total warfare; the return to power in 1945 of a Labour Government pledged to economic planning, nationalization, full employment, and a substantial degree of equality; this sequence of historic events transformed the situation.. ..Parliament wanted the government to possess vast, overwhelming powers over an immense range of matters...." (Prof. Robson.)

The widespread legislative policy of conferring on Ministers and tribunals in the widest subjective terms, makes it impossible in most cases for the courts to challenge decisions. Furthermore, the courts themselves have increasingly realized that judicialization of administration is impracticable. The Common Law rules were formulated in the laissez-faire era to protect individual rights even when the rights were anti-social in nature. The rules of natural justice have been static since the Arlidge case in 1915. Only Parliament has the power to carry out a social revolution. Another factor has been stated to be the complexity and technicality of subject-matter. Modern judges, it has been said, are less distrustful of the executive than they once were.

Professor Scott takes a contrary view. Writing in 1947 in the Annual Bar Review, he states "an examination of the cases over the last 25 years would seem to indecate that the courts have maintained a very wide area of control despite all the legislature has done to exclude them and the result is that, contrary perhaps to prevailing belief, judicial control of administrative acts is increasing rather than declining."

Prof. Willis also takes the view that judicial review is definitely increasing, giving as examples (I) an increase in the class of discretions which the court is prepared to control, (2) the inclusion of procedural error in the class of facts which dprive the tribunal of jurisdiction; and (3) the evasion by the courts of sections of enabling acts which purport to deprève the courts of their power of review.

Another Canadian judicial writer, writing in the I942 CBR at p.465, has stated that "judicial review of administrative adjudication has become a commonplace with respect to matters of law, of jurisdiction, of adequacy of procedure, of procedural fairness, and even of the question of the sufficiency of evidence."

We have seen throughout the course of this paper that the courts have received material assistance at every turn in asserting powers of review by the ambiguity of every concept inherent in the adjudicatory process; (I) the difficulty if not the impossibility of distinguishing between "law and fact"; (2) the difficulty if not the impossibility of distinguishing judicial from administrative functions, and the readiness of the courts as a consequence to introduce the seductive hybrid "quasi-judicial", and, (3) the almost random ease with which a favourable interpretive rule may be selected from the available armoury.

On the most recent decisions, we have seen evidence of judicial restraint in the cases following upon the Wilsonv Nanaimo precedent, and also almost bellicose assertiveness. The Pure Springs Case which has been declared to be good law by the Supreme Court of Canada, whether on sound judicial principles or not, is certainly authority for a highly restrictive curial viewpoint on powers of review. On the other hand, there are a number of decisions as we ha ve seen, culminating perhaps in Re Safeways, where the court is quite prepared to review decisions which are admittedly purely administra tive, presumably even where there is no error of alw on the record.

It may well be that Prof. Robson's view is justified in postw ar England under the collectivization complex and aegis of socialism. On the other hahd, we might expect to find judicial review more virile in a country not yet resigned to ultimate accepatance of collectivist concepts current elsewhere. In the long run, the law must form a superstructure of the predominant "animus" of the jurisdiction, socialogical, political and economic.